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No. 84-490

Supreme Court of the United States

OCTOBER 1984 TERM

TEXAS OIL & GAS CORP.,

Petitioner

v.

ARKLA EXPLORATION COMPANY,
STATE OF ARKANSAS, and
WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,

Respondents

ON APPEAL FROM THE UNITED
STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I. QUESTIONS PRESENTED

1. Where two circuit courts of appeals have issued contradictory mandates to the Secretary of the Interior—one requiring him to reinstate Petitioner's federal oil and gas leases, the other barring him from doing so—should this Court exercise its supervisory jurisdiction to provide a final resolution of the Secretary's duties and the validity of the leases in question?

2. Does the Eighth Circuit Court of Appeals have the power to order the Secretary of the Interior to disobey a final and unappealed order of the United States Court of Appeals for the District of Columbia Circuit?

3. Did the Eighth Circuit Court of Appeals err when it declared invalid the regulatory procedures by which the Secretary of the Interior has historically classified and issued federal oil and gas leases? Did that court further err when it affirmed the district court's issuance of instructions to the Secretary ordering him to adopt a detailed, judicially-created classification system in place of the system prescribed by the Secretary's long-standing regulations?

4. Did the Eighth Circuit Court of Appeals unlawfully cloud title to all on-shore federal oil and gas leases by discarding title principles which had previously insulated issued federal leases from challenges brought by private parties?

II. PARTIES

The parties to the proceedings below (which included actions in two courts of appeals, two district courts and two agencies of the Department of Interior) were those which appear in the caption and the following:

William Clark has been substituted as the Secretary of the Interior pursuant to Supreme Court Rule 40.3 in place of his predecessors, Cecil D. Andrus and James G. Watt—each of whom served as Secretary during periods relevant to these actions.

The States of California, Colorado, Idaho, North Dakota, Nevada, Oklahoma, Utah, Wyoming and New Mexico were granted leave to file a brief *amicus curiae* before the Eighth Circuit Court of Appeals.

Petitioner Texas Oil and Gas Corp. has no parent companies. Its subsidiaries and affiliates are as follows: B-V Gas Gathering Systems, Inc.; Delhi Gas Pipeline Corporation; FWA Drilling Company, Inc.; FWA Equipment & Mud Company, Inc.; The Nueces Company; Osark Gas Pipeline Corporation; Tonhawa Gas Processing Company; TXO Minerals, Inc.; TXO Oil Company; TXO Production Corp.; Western Transmission Corporation.

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Exhibit 3: *Arkla Exploration Co.* v. *Andrus*, Civ. No. 79-2501 (D.D.C. Oct. 10, 1980)

Exhibit 4: *Arkla Exploration Co.* v. *Watt*, 548 F. Supp. 466 (W.D. Ark. 1982)

Exhibit 5: *Arkla Exploration Co.* v. *Watt*, 562 F. Supp. 1214 (W.D. Ark. 1983)

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V. OPINIONS BELOW

The opinion of the United States District Court of the District of Columbia in the case of *Texas Oil & Gas Corp.* v. *Andrus* is reported at 498 F. Supp. 668 (D.D.C. 1980). The decision of the United States Court of Appeals for the District of Columbia Circuit reversing that decision and ordering reinstatement of TXO's leases is reported at *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C. Cir. 1982).

The decision of the United States District Court for the District of Columbia dismissing Arkla's first challenge to the TXO leases is unreported, and is captioned *Arkla Exploration Co.* v. *Andrus*, No. 79-2501 (D.D.C. Oct. 10, 1980) (order dismissing case).

The decisions of the United States District Court for the Western District of Arkansas in the second Arkla challenge to the TXO leases appear at *Arkla Exploration Co.* v. *Watt*, 548 F. Supp. 466 (W.D. Ark. 1982) and *Arkla Exploration Co.* v. *Watt*, 562 F. Supp. 1214 (W.D. Ark. 1983). The decision of the Eighth Circuit Court of Appeals affirming those decisions appears at *Arkla Exploration Co.* v. *Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984).

VI. GROUNDS FOR JURISDICTION

Plaintiffs invoked the jurisdiction of the district court pursuant to 28 U.S.C. § 1331 (Supp. V 1981) (federal question), 28 U.S.C. § 1361 (1976) (mandamus), 28 U.S.C. § 2201 (1976) (declaratory judgment), 5 U.S.C. § 702 (1976) (judicial review of administrative actions) and 28 U.S.C. § 1346 (1976 & Supp. V 1981) (United States as a defendant).

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 7, 1984. The Order of the Court of Appeals denying the separate petitions for rehearing filed by the Secretary and TXO was entered on July 3, 1984, and this

Petition for Certiorari is being filed within 90 days of such date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1976).

VII. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 17 of the Mineral Leasing Act of 1920 (30 U.S.C. § 226 (1976)) provides in relevant parts:

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
>
> (b) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding . . . .
>
> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding.

Section 32 of the Mineral Leasing Act of 1920 (30 U.S.C. § 189 (1976)) provides:

> The Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter.

Section 42 of the Mineral Leasing Act of 1920, as added September 2, 1960, Pub. L. No. 86-705, § 5, 74 Stat. 790, (30 U.S.C. § 226-2 (1976)) provides:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

43 C.F.R. 3100.0-5(1) (1983) provides:

> 'Known geological structure' ('KGS') means technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

VIII. STATEMENT OF THE CASE

Section 17 of the Mineral Leasing Act of 1920 grants the Secretary of the Interior power to lease federally owned lands which are known or believed to contain oil or gas deposits. In carrying out this task, the Secretary is required to lease such lands "without competitive bidding" unless the lands are determined to be within a "known geological structure of a producing oil or gas field" (hereafter referred to as a KGS), 30 U.S.C. § 226(c) (1976).

In 1979, after determining that certain lands in Ft. Chaffee, Arkansas were not included within a KGS, the Secretary issued 20 leases by standard noncompetitive procedures to Texas Oil and Gas Corp. (TXO), the Petitioner herein. Approximately 2 months after lease issuance a competitor of TXO, Arkla Exploration Company (Arkla and TXO operate the only two gas transmission pipelines in the region), awoke to the fact that its competitor had leased a large block of land within its service area. This discovery did not please Arkla, which responded with a flurry of activities designed to obtain cancellation of the TXO leases. Arkla convinced several Congressmen and Senators to request that the Secretary cancel the TXO leases (*see, Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427, 430, 435, (D.C. Cir. 1982)), and it filed an administrative protest and two separate (although identical) lawsuits in the District of Columbia and Western District of Arkansas seeking lease cancellation. The primary thrust of Arkla's contentions before

Congress, the Secretary and the courts was that the TXO-leased lands should have been included in a KGS, and therefore should have been offered for lease competitively. Shortly after filing its lawsuits, Arkla moved to change venue from Arkansas to the District of Columbia and obtained a consolidation of its two actions in the D.C. district court.

Arkla's political and administrative protests caused Secretary Cecil Andrus to order the United States Geological Survey (USGS) to reconsider the propriety of the KGS determination. That review concluded that the KGS boundaries had been properly defined. The Secretary then decided to cancel the TXO leases on grounds unrelated to the KGS issue. TXO challenged the cancellation in an action before the United States District Court for the District of Columbia.

After administrative cancellation of the leases and while the TXO suit before the D.C. district court was pending, the Bureau of Land Management of the Department of the Interior (BLM) dismissed Arkla's administrative protest. Arkla failed to appeal that dismissal, although Interior regulations require that an appeal be taken before a protesting party can obtain a final and judicially reviewable agency order. 43 C.F.R. § 4.411 (1983).

The district court for the District of Columbia then issued its opinion in *Texas Oil & Gas Corp.* v. *Andrus*, 498 F. Supp. 668 (D.D.C. 1980) affirming the Secretary's cancellation of the TXO leases. TXO immediately appealed to the D.C. Circuit. The same district court then, on its own motion, and over the objections of Arkla's counsel, dismissed the separate Arkla KGS action "without prejudice." Arkla failed to file a protective appeal to this dismissal, despite having acknowledged in oral argument that the effect of such a dismissal in the face of the applicable 90-day statute of limitations set out in 30 U.S.C. § 226-2 (1976) would be to prevent later refiling of the action if the D.C. Circuit overturned the district court's *TXO* decision. Instead, Arkla moved to file an *amicus* brief before the D.C. Circuit for the stated ground that the ongoing TXO appeal

"would resolve the issue of the validity of the leases." Arkla Motion for Leave To File Brief as *Amicus Curiae*, p. 1.

The D.C. Circuit reversed the district court, ruling that "the leases were valid when issued," and that "the validity of the issued leases continues undiminished" by the Secretary's action. The Secretary was therefore ordered to reinstate TXO's leases. *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427, 435 (D.C. Cir. 1982).

On August 4, 1982, Arkla refiled its long-since dismissed lawsuit. This time Arkla chose to file the action in the Western District of Arkansas, the same venue which it had previously described as being less appropriate than the District of Columbia. Within 60 days of filing, the Arkansas district judge. over the objections of TXO and the government, held a four day trial of the action and issued preliminary and permanent injunctions barring the Secretary from complying with the outstanding mandate of the D.C. Circuit, declaring the Secretary's KGS regulation invalid and requiring the Secretary to revise his KGS procedures to comply with detailed standards spelled out in the opinion. The Secretary and TXO appealed to the Eighth Circuit, which affirmed the district court by a divided panel. Petitions for rehearing filed by both the Secretary and TXO were denied. This Petition is taken from the final action of the Eighth Circuit.

IX. ARGUMENT

A. Review of This Court Is Required to Reconcile the Two Appeals Courts' Mandates Regarding the Same Subject Matter.

This Court's Rule 17 lists as the first of the "special and important reasons" for granting a writ of certiorari the circumstance presented "[w]hen a federal court of appeals has rendered a decision in conflict with the decision of another

federal court of appeals on the same matter. . . ." Such a case is presented by this Petition.

In issuing its decision in *Texas Oil & Gas Corp.* v *Watt*, 683 F.2d 427 (D.C. Cir. 1982), the D.C. Circuit considered the propriety of the Secretary's attempted cancellation of TXO's leases and concluded:

> The first consequence that flows from our decision is that the Fort Chaffee leases must be reinstated. We have rejected the Secretary's proffered rationale for cancellation; the leases were valid when issued.

Id. at 435.

The Eighth Circuit opinion, which is the object of this Petition, affirmed a district court decision enjoining the Secretary from doing the very act which he was required to do as "the first consequence" of the D.C. Circuit opinion. 562 F. Supp. at 1227. In affirming that injunctive order, the Eighth Circuit used the following rationale:

> Because we hold these leases invalid notwithstanding the timeliness of TXO's application for them, our mandate necessarily supersedes that of the D.C. Circuit. The parties should not have any doubt that the instant decision now controls this matter.

734 F.2d at 353.

As these two extracts reveal, exercise of this Court's supervisory jurisdiction is required to forestall the Secretary's being in contempt of one of the two orders, and to grant Petitioner TXO a definitive ruling upon the current validity of its oil and gas leases.

B. The Eighth Circuit Exceeded Its Power When It Declared That Its Mandate Supersedes the Mandate of the District of Columbia Circuit.

The order of the Eighth Circuit contains a component which, again in the language of this Court's Rule 17, so far

departs "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." That component is the portion of the opinion wherein the Eighth Circuit commented upon the current status of the outstanding mandate of the D.C. Circuit and concluded that such mandate is no longer valid, because it is "superseded" by the mandate of the Eighth Circuit.

The Eighth Circuit based its authority to "supersede" the D.C. Circuit order upon an asserted right to interpret the continuing validity and scope of the D.C. Circuit mandate:

> The D.C. Circuit, however, ruled only on the timeliness of TXO's lease applications under applicable federal statutes and has ordered only that TXO's leases be reinstated '[a]s matters stand. . . .' 683 F.2d at 435. That Court did not consider the KGS issue. Its ruling presupposes that the leases were issued in accordance with the then applicable law and that the leased lands are not within a KGS. For our Court to require the Secretary to offer these lands for lease only after a lawful KGS determination does not conflict with the decision of the D.C. Circuit, to which this issue has never been presented.

734 F.2d at 353.

This characterization of the scope of the D.C. Circuit mandate finds no support in the language used by that court. The decision of the D.C. Circuit is phrased in as unconditional a form as is possible. Even though the D.C. Circuit recognized that the district court had dismissed the *Arkla* KGS challenge without prejudice (683 F.2d at 430 n.4), it did not make its order to reinstate TXO's leases contingent upon Arkla's decision to refile its dismissed lawsuit. To the contrary, the language of the D.C. Circuit decision demonstrates that the court agreed with Arkla's contention that the D.C. Circuit decision "would resolve the issue of the validity of the [TXO] leases." Arkla Motion for Leave To File Brief *Amicus Curiae*, p. 1.

What the Eighth Circuit has done in its decision is to arrogate to itself the power to sit in review of the decision of the D.C. Circuit. It has declared that although the D.C. Circuit issued a mandate which unconditionally ordered the Secretary to reinstate TXO's leases, it ought to have limited the scope of its mandate so as specifically to allow subsequent challenges to be brought concerning other aspects of the lease issuance process. It is every bit as much a review function to declare that a court ought to have limited the scope of its mandate as it is to declare that it was in error in having issued the mandate in the first place. This principle is particularly true where, as here, the "limitation" read into the mandate is such as to cause it to be wholly "superseded" by a mandate which orders the very same person to take the opposite action he was previously ordered to take with respect to the same piece of property.

The Eighth Circuit has no power to so "interpret" a mandate of a co-equal circuit. While it is not bound by the D.C. Circuit's decisional law, it has no power to enjoin a cabinet officer of the United States from obeying a clear and unconditional order of another circuit that certain leases be reinstated. Should this Court not correct this abuse of the Eighth Circuit's power by granting this Petition and issuing a final ruling on the validity of Petitioner TXO's leases, then the D.C. Circuit, in turn, must decide whether to acquiesce in the attempt by the Eighth Circuit to overrule its mandate. Petitioner asserts that it is the unique responsibility of this Court to relieve the D.C. Circuit of the necessity of having to declare its independence from the review power of the Eighth Circuit.

C. The Lower Courts Erred in Replacing the Secretary's Historic Method of Leasing Lands with Judicially Prescribed Procedures of Lease Classification.

The effect of the Eighth Circuit's decision in this case will, if not reversed, extend far beyond the boundaries of TXO's leases. Dissenting Circuit Judge Gibson concluded that approv-

al of the "lengthy and detailed" requirements for making KGS determinations set out in the district court opinion "means that the court is imposing substantial restrictions on the work of the Secretary. The record indicates that some 17,000 to 18,000 leases per year are submitted for approval. To require the consideration of the factors required by the district court would bring to a standstill any meaningful activity in this area." 734 F.2d at 363 (Gibson, J., dissenting).

Despite Judge Gibson's warning that the majority "paints with too broad a brush" (*id.* at 361), the majority failed to restrict, modify or do anything except affirm in its entirety the district court judgment. By so doing, the circuit court affirmed an order which the Secretary declared to be an administrative nightmare: "[The decision] attempts to set down certain standards for making KGS determinations which are, in fact, contradictory and unfounded, and which, in many frequently encountered situations, are impossible to administer in a practical sense." Government Petition for Rehearing *En Banc*, p. 5.

The Secretary's concern is well founded. Although the district court conducted a four-day trial (characterized by Judge Gibson in dissent as *de novo*), it found no evidence that the challenged KGS determination departed from the standards in use for decades in issuing thousands of other leases. Consequently, in order to accomplish its goal of cancelling the TXO leases, the district court invalidated the Secretary's regulatory definition of KGS as contrary to law, notwithstanding testimony of government officials that the regulatory definition had been developed shortly after passage of the 1920 Act, and had been adhered to consistently since.

Although invalidation of a regulation describing administrative procedures in use for over 50 years is by itself a radical act, the district court did not stop there. Apparently the court feared that since the KGS determination had already been

reviewed and approved, a simple remand to the Secretary might not result in a re-classification of the TXO-leased lands into a KGS status. In order to ensure that the Secretary would reverse his prior decisions on remand, the district court took the extra step of telling the Secretary exactly what his new regulations should say. First, the court defined the term "KGS" as being "equated with 'domes and anticlines'." 562 F. Supp at 1226. Then the court declared that: "In making any future KGS determinations, the following factors, among others, need be considered: . . . all geological data currently available to the department. . . ." *Id.* at 1227. At least sixteen specific items were enumerated by the district court as requiring consideration by the Secretary, presumably as a judicial minimum for meeting the more inclusive standard of "all geological data." *Id.* Finally, and completely without authority, the court grafted onto the purely technical nature of its own KGS definition an economic component, requiring the Secretary to give consideration to "competitive interest" and "the clearly expressed Congressional purpose in providing the State of Arkansas and its counties and schools with a 'fair' return on the value of the lands and minerals acquired from the State of Arkansas by the federal government. . . ." *Id.* at 1226-27.

Replacement of the Secretary's long-standing administrative program with one created by the district court comports with none of the standards of judicial review which should have governed the district and circuit court deliberations. Determination of the scope of review of the particular agency action at issue in this case ought to have begun with an evaluation of the statutory language of the delegation to the Secretary found in Section 32 of the Mineral Leasing Act. In that section Congress delegated to the Secretary authority "to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this chapter." 30 U.S.C. § 189 (1976). This portion of the statute was inserted in an amendment introduced on the House floor and explained by its sponsor as follows:

> Mr. Chairman, the purpose of this amendment is to make certain that the Secretary has the right to ascertain and determine the boundaries of the oil structures and fields. I think he has that right, but in order to make it absolutely sure, I offer the amendment.
>
> . . . .
>
> [S]ome of the experts suggested that it [KGS] was a very loose, ambiguous term, and if you give the Secretary the right to define these structures and fields, it will take away all uncertainty and ambiguity.

58 Cong. Rec. H7645 (Oct. 28, 1919) (statement of Rep. Sinnott).

As discussed in Part D of this Argument, *supra*, Congress had good reason to commit the technical fact-finding function of KGS determinations to the non-reviewable discretion of the Secretary. Yet even if reviewability is assumed, it is clear from the statutory language, the congressional history and the technical and factual nature of the process that the scope of judicial review is to be narrow. Judge Gibson, in dissent, described the scope of review which should have been utilized by the district court in the following terms:

> [M]ore than mere error is necessary to meet the test and . . . administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. [citation omitted] Further, evidentiary conflicts should be weighed in favor of the administrative action.

734 F.2d at 362 (Gibson, J., dissenting).

The district court and the majority of the circuit court, on the other hand, improperly interpreted this Court's decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971), as authority for what amounted to a *de novo* review in which no deference whatsoever was afforded to the Secretary's regulation, procedures or the testimony of his officials.

Moreover, the district and circuit courts took the further step of dictating the result and the details of the rulemaking

process which they necessitated by their invalidation of the existing regulation. That result, although couched in terms of gleaning 65-year old legislative intent, is, in fact, nothing less than judicial legislation. The simple language of Section 32 plainly does not support the district court's holding that the Secretary is required by that statute to consider "all geological data" as well as "competitive interest" and "providing the State of Arkansas and its counties and schools with a 'fair' return" in making his KGS determinations. 562 F. Supp. at 1226-27.

In casting aside the Secretary's own program and prescribing to him how to carry out the technical aspects of his duties, the district court, as affirmed by the Eighth Circuit, has massively intruded into the administrative domain. The resulting paralysis and confusion in the administration of one of our country's most important energy programs graphically illustrate the merit of administrative law principles requiring judicial restraint in reviewing agency practices and judicial abstention from the legislative and rulemaking processes.

D. The District and Circuit Court Decisions Cloud Title to All Federal Leases by Cancelling TXO's Issued Leases.

Prior to this case, there was only a single reported case delineating the role of the judiciary in reviewing challenges of the Secretary's KGS determinations. The D.C. Circuit ruled in *Wann* v. *Ickes,* 92 F.2d 215, 217 (D.C. Cir. 1937):

> It is too well settled to require citation of authority that the determination by the Secretary of a question of fact, in a matter within his jurisdiction, is binding upon the courts. Nor will the courts entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination. De Cambra v. Rogers, 189 U.S. 119, 122. . . .
>
> We think that the finding of fact by the Secretary that the lands here involved were known since 1931 to be within the geologic structure of a producing oil and gas field is conclusive.

The Eighth Circuit acknowledged the variance between its holding and that of the D.C. Circuit by stating that *Wann* had been overtaken by events and "does not represent the current law." 734 F.2d at 355, n. 11. In so ruling, the Eighth Circuit also rejected the holding of this Court in *West* v. *Standard Oil Co.*, 278 U.S. 200, 219 (1929) that: "After issue of the patent or other like instrument, [the Secretary's] findings of facts are conclusive, in the absence of fraud or mistake, not only upon the Department, but upon the courts. . . ." Both these decisions articulate substantive rules of title which have been relied upon by those who have acquired federal leases. The passage of time ought to solidify the validity of these rules of repose, rather than call them into question.

The interest in title security is as great in the case of oil and gas leases as it is in any other real estate interest. Judge Breitenstein has described the economic basis for this principle in the following terms:

> The drilling of wells requires substantial financial risks and expense of putting those wells on production and of marketing the product is burdensome. If the continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed.

Pan American Petroleum Corp. v. *Pierson*, 284 F.2d 649, 655 (10th Cir. 1960), *cert. denied*, 366 U.S. 936 (1961).

The Secretary has been cognizant of the government's long-term interest in conveying good title to its leases and has accordingly never asserted the right to cancel an issued lease for mistake in making a KGS determination. This case introduces an entirely new cloud on the title of federal leases. Under it the government's procedures can be reexamined—regardless of limitations upon time of action—by strangers to the lease and over the government's objections.

In analyzing the district court's opinion, one commentator has noted:

> If this aspect [the detailed new procedures for the KGS determination process] of the decision in *Arkla* is upheld, title security to federal oil and gas leases . . . will be jeopardized. . . . [O]ne of the cornerstones of title security to a lease issued non-competitively has been reliance upon the determination of the Department that none of the lands covered by the lease was within a known geologic structure on the date of the lease issuance. . . . If upheld on appeal, the decision in *Arkla* may mean that it is no longer possible to rely upon the determination by the Department that lands are [non-KGS] because that determination may be subject to challenge, even after leases have been issued and the appeal period to challenge issuance of the leases has expired.

Ekberg, "Federal Oil and Gas Leasing: Developments in Selected Problems and Issues," 29 Rocky Mtn. Min. L. Inst. 589, 639-40 (1983).

Of immediate concern to leaseholders such as TXO is the fact that *all* on-shore federal leases, whether issued competitively or noncompetitively, were issued in accordance with procedures which the district court and the Eighth Circuit have now declared invalid. As such, they are subject to challenge and cancellation by competitors on the same basis as TXO's Ft. Chaffee leases.

Furthermore, the Secretary will be effectively barred from going forward with his announced plans to offer future non-competitive leases pursuant to procedures which he amended and implemented under the authority of the regulation which the Eighth Circuit declared to be invalid. 49 Fed. Reg. 26919 (June 29, 1984). He will instead be required to impose a moratorium on leasing until new regulations and procedures are devised which attempt to comply with the district court and Eighth Circuit opinions. Of course, even after the Secretary attempts to comply with these courts' orders, the decision in this

case will invite constant litigation to determine whether he properly considered "all" geologic data available to him and all evidence of "competitive interest."

The ability of private parties to accept the lower courts' invitation to challenge the validity of issued federal leases will be further enhanced by those portions of the Eighth Circuit and district court opinions which do not deal directly with the KGS issue. Prior to issuance of the decision in this case various doctrines of repose insulated federal lessees from challenge by private parties. As a result, lessees believed, and their title lawyers were willing to opine, that federal leasehold titles were sufficiently secure to warrant expenditure of large amounts of risk capital on development of the leases. Application of these doctrines ought to have resulted in dismissal of Arkla's suit. The opinions below discarded these doctrines, thus lessees in the future will be unable to assure themselves that their leases are any more insulated from challenge than were TXO's leases at Ft. Chaffee.

They will, for example, no longer be able to rely upon the need of potential lease challengers to avail themselves of, and exhaust all, administrative remedies prior to filing a judicial challenge to leasehold validity. In this case, after filing a "protest" with the BLM, Arkla allowed that case to be dismissed without appeal. Departmental rules require that failure to appeal within 30 days bars a challenger from further pursuing its requested relief. 43 C.F.R. § 4.411 (1983). Yet the Eighth Circuit allowed Arkla and the State of Arkansas successfully to pursue a judicial appeal on the grounds that: "When the D.C. Circuit then issued a mandate ordering the Secretary to reinstate the leases, it became highly improbable that the State of Arkansas could ever obtain relief in the context of an administrative proceeding." 734 F.2d at 355.

Nor will lessees in the future be entitled to rely upon the 90-day statute of limitations set out in 30 U.S.C. § 226-2

(1976). Plaintiffs failed to bring this action within the 90-day period, and yet they were not barred from filing this action. Instead the Eighth Circuit ruled that Arkla's prior suit and the Secretary's illegal cancellation order tolled the statute for over three years. Yet Arkla allowed its prior action to be dismissed, without appeal. Dismissal of a suit, even without prejudice, has always (until issuance of the opinion in this case) meant that the time during which it was pending no longer serves to toll an applicable statute of limitations. *Curtis* v. *United Transportation Union*, 648 F.2d 492, 495 (8th Cir. 1981); J. Moore, J. Lucas & J. Wicker, *Moore's Federal Practice* ¶ 41.05[2] at 41-76 & -77 (2d ed. 1982). The circuit court opinion reversed this hitherto unchallenged proposition and also held that during the period of time in which the Secretary's illegal lease cancellation was in force the statute was also tolled. Even more incredibly, the decision went on to hold that since neither period alone tolled the statute long enough to allow Arkla to bring its Arkansas action, both may be tacked together to accomplish this result because "[t]he Secretary has known since September, 1979 of Arkla's opposition to these leases." 734 F.2d at 356.

This holding nullifies Congress' statute of limitations by equating it with the doctrine of laches. Moreover, it does so even where laches would probably bar Arkla's action because it failed to take the simple step of filing a protective appeal of the dismissal of its lawsuit in the D.C. district court.

In addition, lessees will not be able to rely upon the principle that Congress delegated exclusive power over administration and policing of the leasing program to the Secretary. Prior to this opinion the two circuits which had considered the issue had concluded that no private right of action exists under the Mineral Leasing Act because "[t]he Secretary, and not the citizenry at large, was intended to oversee the proper allocation and development of the public lands." *Naartex Consulting*

Corp. v. *Watt*, 722 F.2d 779, 790 (D.C. Cir. 1983), *cert. denied sub nom. Naartex Consulting Corp.* v. *Clark*, ... U.S. ....., 52 U.S.L.W. 3844, 104 S. Ct. 2399 (1984). *Accord, Pullman* v. *Chorney*, 712 F.2d 447, 449-50 (10th Cir. 1983).

In this decision, however, the Eighth Circuit has elevated Arkla, a disappointed competitor with no claim of interest in the lease, into private attorney general status, free of the procedural restrictions on bringing suit prescribed by principles of exhaustion of administrative remedies, statutes of limitations, standing and collateral estoppel. At the behest of this private party, the courts have re-written the Secretary's procedures and Congress' policies respecting whether lands should be leased competitively or noncompetitively, and countenanced after the fact scrutiny of validity of issued government leases based on arguments of "fair return." If not reversed this decision will lead to the result which was predicted by government witnesses at trial: investment in and exploration on federal lands will be discouraged, delayed and made more expensive. Thus, rather than resulting in a greater return for the government, this decision will result in a lessening of the value of all its oil and gas interests.

X. CONCLUSION

Testimony in this case established that over 90% of all federal revenues from onshore federal oil and gas leases are derived not from lease bonus payments, but from payment of royalties. Trial Transcript, Vol. II at 771-72, *Arkla Exploration Co.* v. *Watt*, No. 82-2168 (W.D. Ark. Sept. 30, 1982) (testimony of Mr. Zimmerman). Cognizant of this fact, Congress and the Secretary have believed it of paramount importance to encourage prompt exploration of and production from the federal lands.

The effect of the decision below is to indefinitely delay leasing of federal lands until a wholly new and unworkable regulatory system is adopted and put in place. The decision will

also so cloud the title to federal leases that even after new procedures are devised, the value of those leases will be substantially reduced and the ability of exploration companies to drill on them will be impaired.

This Court ought not to allow its lower courts to so interfere with the workings of a long-standing administrative program. Nor should it allow its lower courts to become so preoccupied with perceived administrative failures that they are willing to attempt to overrule the mandate of another court of appeals. Grant of the writ sought by this Petition will allow the Court to redress these errors.

Respectively submitted,

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APPENDIX

Exhibit 1: *Texas Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668 (D.D.C. 1980).

Exhibit 2: *Texas Oil & Gas Corp. v. Watt*, 683 F.2d 427 (D.C. Cir. 1982)

Exhibit 3: *Arkla Exploration Co. v. Andrus*, Civ. No. 79-2501 (D.D.C. Oct. 10, 1980).

Exhibit 4: *Arkla Exploration Co. v. Watt*, 548 F. Supp. 466 (W.D. Ark. 1982).

Exhibit 5: *Arkla Exploration Co. v. Watt*, 562 F. Supp. 1214 (W.D. Ark. 1983).

Exhibit 6: *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984).

EXHIBIT 1

498 Federal Supplement 668

TEXAS OIL & GAS CORP., Plaintiff,

v.

Cecil ANDRUS, Defendant,

Civ. A. No. 79-2976.

United States District Court,
District of Columbia.

Sept. 25, 1980,

As Amended Sept. 26, 1980.

In action by lessee challenging decision of Secretary of Interior to cancel its non-competitive oil and gas leases within military reservation, the District Court, Joyce Hens Green, J., on cross motions for summary judgment, held that: (1) Secretary could revoke leases because lease applications, although coming after effective date of statutory amendment eliminating prohibition against all oil and gas leases on military reservation, were submitted prior to effective date of change in implementing regulation, based on his reasonable interpretation of department regulation to require rejection of applications in that they sought leasehold interest in land "not * * subject * * * to the operation of public land laws"; (2) Secretary was not estopped from invalidating leases, based on oral representations of officials of Bureau of Land Management about validity of applications filed; and (3) evidence was insufficient to establish that Secretary's decision was improper as rendered for political rather than policy reasons.

Defendant's motion granted.

See also, 498 F.Supp. 677.

1. Mines and Minerals —5.1(7)

Absent any congressional enactment withdrawing such authority, it is within power of Secretary of Interior to cancel administratively any lease that was invalid from its inception because it was issued in violation of department regulations or statute.

2. Mines and Minerals —5.1(7)

There being nothing in Mineral Leasing Act for Acquired Lands that in any way deprives Secretary of Interior of authority to cancel leases issued in violation of statute or regulation, under proper circumstances Secretary could exercise such power to invalidate oil and gas leases. Mineral Leasing Act for Acquired Lands, § 2 et seq. as amended 30 U.S.C.A. § 351 et seq.

3. Administrative Law and Procedure —413

Judicial deference to which agency's interpretation of its own regulation is awarded is great, such that if several reasonable interpretations are available, agency's construction need only be one of those, and not necessarily the most reasonable of alternative interpretations.

4. Mines and Minerals —5.1(7)

Secretary of Interior could revoke previously issued noncompetitive oil and gas leases within military reservation because lease applications, although coming after

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effective date of statutory amendment eliminating prohibition against all oil and gas leases on military reservation, were submitted prior to effective date of change in implementing regulation, based on his reasonable interpretation of department regulation to require rejection of applications in that they sought leasehold

interest in land "not * * * subject * * * to the operation of public land laws." Mineral Leasing Act for Acquired Lands, § 3 as amended 30 U.S.C.A. § 352.

5. Constitutional Law —320.5

Where Secretary of Interior invalidated leases that were issued subject to cancellation for strictly legal deficiency, failure to afford hearing prior to cancellation did not violate due process under either Fifth Amendment or Administrative Procedure Act. 5 U.S.C.A. §§ 553, 554; U.S.C.A. Const. Amend. 5.

6. Estoppel —62.1

Doctrine of estoppel is to be applied to government only in most extraordinary circumstances and with greatest care and circumspection.

7. Estoppel —62.1

Party asserting estoppel against the government must not only establish traditional elements of false representation, purpose to invite action by party to whom representation was made, ignorance of true facts by that party and reasonable reliance, but must also make showing of injustice to him and lack of undue damage to public interest.

8. Estoppel —62.2(4)

Secretary of Interior was not estopped from invalidating previously issued noncompetitive oil and gas leases based on oral representations of officials of Bureau of Land Management about validity of applications filed, since lessor's reliance could hardly be called reasonable in light of Interior Department's comments which placed lessor on notice of possibility of Department interpretation of pertinent regulation in line with that ultimately made by Secretary; moreover, decision of

Secretary was not contrary or detrimental to public interest in equitable re-leasing of public lands. Mineral Leasing Act for Acquired Lands, § 3 as amended 30 U.S.C.A. § 352.

9. Mines and Minerals —5.1(7)

Evidence of letters submitted by Secretary of Interior by various congressmen and senators and implication arising from timing and subject matter of subcommittee hearing, although regrettable, was insufficient, when taken as a whole, to establish that Secretary of Interior's decision to revoke previously issued noncompetitive oil and gas leases was improper as rendered for political rather than policy reasons.

Jason R. Warran, James W. McDade, Washington, D. C., Bradley D. Jesson, Ft. Smith, Ark., Craig R. Carver, Denver, Colo., for plaintiff.

Andrew F. Walch, Lands Div., Dept. of Justice, Washington, D. C., for defendant.

MEMORANDUM OPINION

JOYCE HENS GREEN, District Judge.

Presented by the parties' pending cross-motions for summary judgment are the questions of the validity of the November 1, 1979, action of defendant Cecil D. Andrus, Secretary of the United States Department of the Interior, in canceling certain oil and gas leases issued on a noncompetitive basis to plaintiff Texas Oil & Gas Corporation for lands located on the military reservation of Fort Chaffee, Arkansas, and, if such cancellation were improper, the validity of the Secretary's September 20, 1979, decree that delayed indefinitely the issuance to plaintiff of the permits required to begin drilling for oil and gas on the land at Fort Chaffee. Only the former issue need be addressed, however, since a thorough review of the

record in this action not only reveals that there are no material facts at issue, but also compels the conclusion that the Secretary's action invalidating the leases was not improper. Accordingly, defendant's motion for summary judgment will be granted and judgment entered in his favor and against the plaintiff. [498 F.Supp. 670]

Because of their importance in the resolution of the issues presented, initial explanation of the statutory and regulatory schemes under which oil and gas leases are issued is required.

The lease agreements in question in this litigation involved approximately 40,000 acres of federal property classified as "acquired" lands, that is, lands which are acquired by the United States through purchase or other transfer from a state or private individual, usually for dedication to a particular use. In contrast to such acquired lands are "public domain" lands, which are owned by the United States by virtue of its sovereignty. The distinction between these types of federal real estate is important in that, as a matter of historical perspective, it was the basis for the evolution of the present statutory scheme through which the Congress has delegated responsibility to the Secretary of the Interior for the leasing of federal lands for mineral development.

The authority of the Secretary to administer the grants of mineral rights on public domain lands has been recognized by Congress since the middle of the last century, see, *e. g.*, Act of July 26, 1866, ch. 262, 14 Stat. 251 (currently codified as amended at scattered sections of 30, 43 U.S.C.); Act of May 10, 1872, ch. 152, 17 Stat. 91 (currently codified as amended at 30 U.S.C. § 21 *et seq.*), although it was not until 1920 that Congress began to authorize the present system of leasing such lands for oil and gas exploration and production by the Secretary, Mineral Leasing Act of 1920, Pub.L. No. 146, ch. 85, 41 Stat. 437 (1920) (currently codified as amended at 30 U.S.C. § 181 *et seq.*). Acquired lands had been leased on an *ad*

hoc basis for some time, but it was not until 1947 that legislation was passed specifically giving the Secretary authority to lease such property. Mineral Leasing Act for Acquired Lands, Pub.L. No. 382, ch. 513, 61 Stat. 913 (currently codified as amended at 30 U.S.C. § 351 *et seq.*).

Of the provisions of that enactment providing for the leasing of acquired lands, most pertinent to this case is its language, found in section 352 of title 30 of the United States Code, denoting which acquired lands are subject to lease. As originally passed, it provided:

> [A]ll deposits of . . . oil [and] gas . . . which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks and monuments, (b) *set apart for military or naval purposes,* or (c) tidelands or submerged lands) may be leased by the Secretary [of the Interior] under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof. . . . No mineral deposit covered by this section shall be leased except with consent of the head of the executive department . . . having jurisdiction over the lands containing such deposit . . . .

30 U.S.C. § 352 (1970) (emphasis supplied). This congressional mandate that acquired lands set aside for military purposes be excluded from those acquired properties that could be leased was continued until 1976 when section 352 was amended to delete that exemption. Federal Coal Leasing Amendments Act of 1975, Pub.L.No. 94-377, § 12, 90 Stat. 1090 (1976), *codified at* 30 U.S.C. § 352 (1976). That amendment precipitated the circumstances that have culminated in this litigation.

On May 9, 1977, some nine months after the effective date of the amendment to section 352, plaintiff Texas Oil & Gas filed applications for thirty-eight noncompetitive oil and gas leases on an area of 78,962.73 acres within the boundaries of Fort Chaffee, Arkansas.[1] These offers were the

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first noncompetitive applications to lease these federal acquired lands set aside for military purposes following the 1976 amendment.

Not long after the congressional change in section 352 in 1976, action was taken by the Department of Defense and the Department of the Interior, the agencies most directly involved, to amend their applicable regulations. A little over one month after the lease applications were filed by Texas Oil & Gas, the Corps of Engineers, despite the recent revision of section 352 enacted in the Federal Coal Leasing Amendments Act, published proposed regulations that would have continued its past prohibition on leasing acquired lands set aside for military purposes for oil and gas exploration and production. 42 Fed. Reg. 31036 (1977). On September 16, 1977, the Department of the Interior responded to the amendment to section 352 by publishing a proposed change in its regulation concerning acquired lands, 43 C.F.R. § 3101.2-1. As it was in effect at the time of the passage of the Federal Coal Leasing Amendments Act, that regulation declared in pertinent part:

---

[1] Leases are to be issued only after competitive bidding for those lands located on a known geological structure of a producing oil and gas field while those lease applications for lands not on such a known structure can simply be granted to the first qualified bidder at his offered price. 30 U.S.C. §§ 226(b)-(c), 352 (1976). Although the validity of the United States Geological Survey's determination that the lands on Ft. Chaffee for which plaintiff was granted leases were not within a known geological structure has come under attack both before the agency and before this Court, see p. 673 *infra*, that issue is not presented in this litigation.

> § 3101.2-1 [Acquired] Lands to which the Act does not apply.
>
> * * * * * *
>
> (f) Set apart for military or naval purposes, including lands within naval petroleum and oil shale reserves . . . .

43 C.F.R. § 3101.2-1(f) (1977). The regulation proposed by the Department of the Interior was to amend subsection (f) to modify its reference to all acquired lands set aside for military purposes so as to include only those "[w]ithin naval petroleum and oil shale reserves and within the National Petroleum Reserve in Alaska." 42 Fed.Reg. 46558 (1977). It was also stated in the *Federal Register* notice accompanying the proposed rule change:

> The regulatory prohibition reflecting the old statutory provision remains in effect, serving as an exercise of the Secretary's new authority to lease or not to lease such deposits. This proposal would remove the regulatory prohibition and open these lands for mineral leasing under the same terms and conditions as apply to other acquired lands . . . .

Id.

Comments on their proposed regulations were requested and received by both the Corps of Engineers and the Department of the Interior, which included comments by plaintiff concerning the proposed change in section 3101.2-1. On July 10, 1978, the final rules of the Corps of Engineers and the Department of Defense were published in which it was indicated that the Corps of Engineers was willing to consider leasing of acquired military lands so long as it did not impair "the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered." 43 Fed.Reg. 29752 (1978), *codified at* 32 C.F.R. § 643.35(a)(1) (1980). As to the Interior Department's proposed change in 43 C.F.R. § 3101.2-1, a final rule adopting

the amendment to subsection (f) was published on August 22, 1978, to be effective September 21, 1978. 43 Fed.Reg. 37202 (1978). In the department's comments on the rule, it was indicated that together the Department of Defense and the Department of the Interior would "determine the suitability of the land for mineral leasing and development on a case by case or area by area basis before the Secretary of the Interior issues a lease." *Id.*

With regard to the validity of the plaintiff's lease applications, because they were filed before the effective date of the Interior Department's regulation concerning leasing of acquired lands used for military purposes, some uncertainty existed in the department about their validity, as a series of documents filed by the parties indicate. Submitted to the Court is a copy of a letter, the original of which was submitted to the Department of Defense by Amoco Production Company as a comment to the department's proposed rule prohibiting the leasing of acquired lands used for military purposes. In that letter it is explained how Amoco Produc-

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tion, like Texas Oil & Gas, had filed lease applications just after the amendment to section 352. On the copy of the letter is a handwritten note signed by an attorney of the Department of Interior assigned to the drafting and comment-analyzing of the regulatory change proposed for section 3101.2-1, which states:

> Dave, have you seen this? These offers are premature and probably should be rejected under Section 2091, but we'd better give some thought to whether we'll have a simo period or an over-the-counter crunch when the final rule is effective. Larry McBride x4803.

Exhibit C to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980). 43 C.F.R. § 2091 referred to in the note, the applicability of which is contested by the parties, states:

> Except where regulations provide otherwise, all applications must be accepted for filing. However, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land or interests in land, when approval of the application is prevented by:
>
> * * * * * *
>
> (e) The fact that for any reason the land has not been made subject, or restored, to the operation of the public land laws.

43 C.F.R. § 2091.1(e) (1979). Seemingly in opposition to this viewpoint is a memorandum dated July 31, 1978, from the Associate Solicitor of the Energy and Resource Division of the Department of the Interior to the Assistant Secretary of the Land and Water Resources Division concerning the final rule that was published in August 1978 in which it was stated:

> 1. As written, the rule assumes that the many lease applications filed soon after the statute was passed are valid applications, even though they preceded this rulemaking. The rule thus gives these applications priority over those filed after the rulemaking is published. While we believe this is lawful, it is an open question that may later be disputed by two applicants before the Board of Land Appeals.

Exhibit D to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980). Finally, on March 1, 1979, the Associate Director of the Bureau of Land Management (BLM) issued Instruction Memorandum No. 79-287 to all State Directors advising them of the change in section 352 and the final regulation published in August 1978, and suggesting that the directors "process the noncompetitive offers and applications (other than coal and lignite) filed after the effective date of the act, that is August 4, 1976, on a first-come-first-served basis in the same manner as other noncompetitive offers on applications for acquired lands." Exhibit I to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980).

Accordingly on June 26, 1979, the offers of Texas Oil & Gas were accepted by the Chief of the Division of Lands and Minerals of the Bureau of Land Management on behalf of the United States and, with the consent of the Corps of Engineers, the twenty leases now in question were granted to plaintiff with an effective date of July 1, 1979. These ten-year leases covered approximately 33,000 acres at a cost of one dollar per acre.

On August 8, 1979, Senator Dale Bumpers of Arkansas wrote a letter to Secretary Andrus in which he questioned the propriety of the issuance of the leases, requested suggestions from the Secretary about legislative changes or amendments to modify the system of lease allocation to remedy what Senator Bumpers felt were inequities and abuses of the system, informed Secretary Andrus that he was requesting a hearing before a Senate subcommittee to examine the entire matter, and urged that no further noncompetitive leases be issued by the department in the interim. Exhibit R to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980). A second letter, dated August 10, 1979, was also sent by Senator Bumpers to the Secretary, again

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raising questions about the issuance of the leases to plaintiff and stating that hearings had been scheduled before the Subcommittee on Energy Resources and Materials Production for September 12, 1979, to gather information about the authority and regulatory scheme under which the leases were issued and to examine the need for legislative action to amend the leasing procedure. *Id.* Exhibit S. By letter dated August 14, 1979, Senator Wendell Ford of Kentucky, the Chairman of the Energy Resources Materials Production Subcommittee, advised the Secretary of the September 12 hearing date. *Id.* Exhibit T.

On August 13, 1979, the Secretary sent a letter in reply to Senator Bumper's correspondence of August 8 in which he defended the Interior Department's action in granting the

noncompetitive leases to Texas Oil & Gas despite the filing of the lease applications prior to the effective date of the regulatory change in 43 C.F.R. § 3101.2-1 and made certain legislative recommendations. *Id.* Exhibit K. Subsequently, at the September 12 hearing, Interior Department officials again defended the issuance of the leases as proper since the Texas Oil & Gas applications were filed after the date of the amendment of section 352. *Id.* Exhibit Z.

Following the hearing additional correspondence was submitted to Secretary Andrus concerning the Texas Oil & Gas leases. On September 13, 1977, a letter signed by Senator Bumpers, Senator Ford, Senator Henry Jackson of Washington, and Senator Henry Bellmon of Oklahoma was sent to the Secretary in which the issuance of the leases to Texas Oil & Gas was criticized on a number of grounds, including the decision to process the applications despite the fact they were filed before the final revision of section 3101.2-1. *Id.* Exhibit U. The Senators also requested that a moratorium be placed on the further issuance of noncompetitive leases within military reservations until such time as administrative and legislative changes had been made in the leasing system. *Id.* On September 14, 1979, Senator Bumpers wrote again to request information on lease assignments and, in the course of that letter, generally criticized the system for the issuance of noncompetitive oil and gas leases. *Id.* Exhibit V. On September 17, 1979, Senators Bumpers, Jackson, and Bellmon again wrote the Secretary to urge that he impose a moratorium on the issuance of noncompetitive leases and that he review the circumstances surrounding the granting of the Texas Oil and Gas leases with an eye toward canceling them. *Id.* Exhibit W.

On September 17, 1979, Arkla Exploration Company filed a protest with the department to challenge the Texas Oil & Gas leases. Arkla also instituted litigation before this Court four days later to challenge the issuance of the leases, which is now

in abeyance pending the outcome of this suit. *Arkla Exploration Co. v. Andrus,* Civ. No. 79-2501 (D.D.C. filed Sept. 21, 1979). See note 1 *supra.*

On September 20, 1979, the Secretary promulgated an order that placed a "hold" on the issuance of any permits to drill on the land leased to Texas Oil & Gas and asked the United States Geological Survey (USGS) to re-evaluate its initial determination that the leased lands were not part of a "known geological structure" (KGS), an important factor in allowing the leases to be issued noncompetitively. Exhibit AA to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980). See note 1 *supra.* Apparently unaware of the Secretary's order, Texas Oil & Gas filed an application for a permit to drill with the USGS that same day. *Id.* Exhibit BB. Although the application was found technically sufficient, by letter dated October 5, 1979, USGS refused to issue the permit because of the Secretary's September 20 order. *Id.* Exhibit CC. Plaintiff filed another application to drill on a second location at Fort Chaffee on October 9, 1979, but USGS again declined to issue the permit because of the Secretary's order. *Id.* Exhibits DD, EE. Also on October 9, USGS reported to the Secretary that its initial determination concerning the non-KGS status of the Ft. Chaffee lands was correct. *Id.* Exhibit II.

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Further congressional correspondence in support of and in opposition to plaintiff's leases was submitted to the Secretary following his September 20 order. On September 28, 1979, Texas Representatives Jim Wright and Martin Frost and Senator Lloyd Bentsen of Texas wrote to the Secretary. Attachment 4 to Defendant's Motion for Summary Judgment (filed Mar. 14, 1980). While declining to comment on the pending validity of the Texas Oil & Gas leases, they nonetheless sought to bring to the Secretary's attention the circumstances surrounding a dispute between Texas Oil & Gas and Arkla Exploration Company concerning a Texas Oil & Gas application for a

permit to build a gas pipeline in Arkansas that was pending before the Federal Energy Regulatory Commission. *Id.* On October 1, 1979, Senator Russell Long of Louisiana wrote to Secretary Andrus to urge the cancellation of plaintiff's leases. Exhibit X to Plaintiff's Motion for Summary Judgment (filed Jan. 18, 1980). Finally, on October 25, 1979, Senator Long and Senator J. Bennett Johnston of Louisiana wrote to the Secretary on behalf of Arkla Exploration Company to "clarify" the record regarding the gas pipeline case before the Federal Energy Regulatory Commission and to urge the Secretary to reach a decision to cancel the plaintiff's leases on Fort Chaffee. *Id.* Exhibit Y.

On November 1, 1979, plaintiff instituted this action, seeking as immediate relief a temporary restraining order to prevent the Secretary from administratively canceling the leases at issue. A hearing date for the application for a temporary restraining order was set for the morning of November 2, 1979. Although the Secretary was informed of that hearing date, on the evening of November 1, he signed an order rescinding plaintiff's leases because the lease applications were submitted prior to the effective date of the change in 43 C.F.R. § 3101.2-1 and thus had to be rejected under 43 C.F.R. § 3091.1. *Id.* Exhibit FF. The following day, the Court denied the motion for a temporary restraining order but granted plaintiff leave to amend its complaint to encompass the events of the previous evening. At the hearing on November 2, the Court was assured by the Government that the lands at Fort Chaffee would not be leased pending the disposition of this lawsuit.

On January 3, 1980, the United States Geological Survey returned plaintiff's two applications for permits to drill, stating that they could not be processed further because of the cancellation of the leases. Attachment 6 to Defendant's Motion for Summary Judgment (filed Mar. 14, 1980). On February 29, 1980, the Secretary issued an order, effective until further

notice, suspending the issuance of all onshore noncompetitive oil and gas leases on both public domain and acquired lands.[2] *Id.* Attachment 5. On March 6, 1980, defendant tendered to plaintiff a United States Treasury check in the amount of $40,434.85 representing the advance paid by plaintiff in connection with its initial applications to lease.

Plaintiff challenges Secretary Andrus' decision to cancel its leases on the lands at Fort Chaffee, a final, administrative order appealable to this Court, on a number of different grounds, any of which, it urges, is sufficient to compel a judicial reversal of that determination and the reinstatement of the leases. Initially, Texas Oil & Gas argues that the Secretary's interpretation of 43 C.F.R. § 3101.2-1 was erroneous because it was the 1976 amendment to 30 U.S.C. § 352, not the change in section 3101.2-1, that opened the lands at Fort

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Chaffee to leasing, rendering improper defendant's invocation of 43 C.F.R. § 2891.1 to reject the leases.

[1,2] It is well-established that, absent any congressional enactment withdrawing such authority, it is within the power of the Secretary of the Interior to cancel administratively any lease that was invalid from its inception because it was issued in violation of departmental regulations or statute. *Boesche v. Udall*, 373 U.S. 472, 476-77, 83 S.Ct. 1373, 1375-1376, 10

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[2] Besides the lease applications submitted by plaintiff for the lands at Ft. Chaffee, before the regulatory amendment of 43 C.F.R. § 3101.2-1 it had also filed for noncompetitive leases on other acquired lands on military reservations. Those lease applications were not granted prior to the Secretary's actions of November 1, 1979, and, as a result thereof, were rejected on November 30, 1979, as filed before the effective date of the change in section 3101.2-1. Plaintiff has filed another action challenging the nullification of those lease applications and the moratorium the Secretary has placed upon further leases, in which a memorandum opinion and order is filed this date. *Texas Oil & Gas Corp. v. Andrus*, 498 F.Supp. 677 (D.D.C. 1980.)

L.Ed.2d 491 (1963); *Winkler v. Andrus,* 614 F.2d 707, 711 (10th Cir. 1980). In *Boesche,* in ruling on the propriety of the Secretary's cancellation of a noncompetitive oil and gas lease issued for certain public domain lands under the authority of the Mineral Leasing Act of 1920, 30 U.S.C. § 226, the Court, citing those statues giving the Secretary the general authority to administer the public lands, 43 U.S.C. §§ 2, 1201, 1457, found nothing in the Mineral Leasing Act that would in any way abrogate the Secretary's authority to cancel the leases administratively because of their incipient invalidity. *Boesche v. Udall, supra,* 373 U.S. at 476, 83 S.Ct. at 1375. While the Secretary's authority to grant leases for acquired lands comes from the Mineral Leasing Act for Acquired Lands rather than the Mineral Leasing Act that was involved in *Boesche,* it is apparent that Congress, in granting the Secretary the authority to issue mineral leases on acquired lands, bestowed that responsibility "under the same conditions as [are] contained in the leasing provisions of the Mineral Leasing Act." H.R. Rep. No. 550, 80th Cong., 1st Sess. 2(1947), *reprinted in* [1947] U.S. Code Cong.Serv., pp. 1661, 1662. There being nothing in the Mineral Leasing Act for Acquired Lands that in any way deprives the Secretary of the authority to cancel leases issued in violation of statute or regulation, under the proper circumstances the Secretary could exercise such power to invalidate oil and gas leases, including plaintiff's.

In exercising his authority to cancel the leases in this instance, the Secretary, invoking the maxim that an agency must follow its own regulations, *see, e.g., Panhandle Eastern Pipeline Co. v. FERC,* 198 U.S.App. D.C. 387, 398 & n.84, 613 F.2d 1120, 1135 & n.84 (1979) (citing authorities), declared plaintiff's leases invalid because they were issued on the basis of applications that should have been rejected under 43 C.F.R. §

2091.1(e) in that they sought leasehold interests in lands "not . . . subject . . . to the operation of the public land laws."[3] The propriety of this action depends entirely on the meaning of the regulation's language "subject . . . to the operation of the public land laws" as it relates to the congressional action in 1976 removing the prior statutory restriction on the leasing of military lands and the regulatory change in 1978 to reflect the statutory amendment.

Despite plaintiff's protestations to the contrary, it is apparent that in amending the Mineral Leasing Act for Acquired Lands in 1976, Congress gave the Secretary discretionary authority, rather than a mandate, to allow military lands to be leased for oil and gas production. The use of the term "may" in the statute is dispositive of this point. *See Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir.), *cert. denied*, 425 U.S. 973, 96 S.Ct. 2171, 48 L.Ed.2d 796 (1976). What is not so clear is whether it was this statutory amendment or the later regulatory change in 43 C.F.R. § 3101.2-1(f) that "subjected" those lands to the operation of the mineral leasing laws, within the meaning of 43 C.F.R. § 2091.1(e). Examining the 1976

[498 F.Supp. 676]

statute and its legislative history, there is nothing to indicate that Congress

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[3] Although plaintiff has challenged the applicability of 43 C.F.R. § 2091.1 to situations involving acquired lands, this contention is without merit. That section is a part of those regulatory provisions of the Bureau of Land Management that apply generally to land resource management without distinguishing between public domain and acquired lands. 43 C.F.R. chap. II, subchap. B (1980). Moreover, in light of section 2091.1's applicability to lease applications filed under the Mineral Leasing Act, *McTiernan v. Franklin*, 508 F.2d 885, 887-88 & n. 3 (10th Cir. 1975), and the congressional mandate that the Secretary's rules and regulations governing acquired lands "shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable," 30 U.S.C. § 359 (1976), the Court finds no basis for holding that section 2091.1 is not relevant here.

desired or compelled the acceptance of either interpretation. Rather, the question was one of construction of the language of section 2091.1(e).

[3-5] The judicial deference to which an agency's interpretation of its own regulation is afforded is great, such that if several reasonable interpretations are available, the agency's construction need only be one of those, and not necessarily the most reasonable of the alternative interpretations.[4] *See, e.g., Expedient Services, Inc. v. Weaver,* 614 F.2d 56, 57 n.1 (5th Cir. 1980); *Belco Petroleum v. FERC,* 191 U.S.App.D.C. 157, 163 n.5, 589 F.2d 680, 686 n.5 (1978). In considering the language and purpose of the 1976 amendment and the regulation, the Court can only conclude that the Secretary could reasonably have given the regulations either of the interpretations espoused by the parties here. That choice resided with the department, and ultimately with Secretary Andrus as head of the agency. As such, his decision to invalidate the

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[4] Despite certain substantive overtones, section 2091.1(e) basically is a procedural regulation in that it establishes certain criteria that will govern whether an application should be considered by officials as properly lodged with the department. Although the practical problems of accepting such applications are obvious, nonetheless there appears to be nothing in the statutory scheme that would prevent the department from considering lease applications for lands not yet "open" to oil and gas exploration as properly filed whenever received, the issuance of the leases being subject to the availability of such lands under the laws governing mineral rights to public lands.

leases was proper as based on a reasonable interpretation of his own regulations which, in turn, required that the applications to lease be rejected.[5]

Anticipating such a determination, plaintiff puts forth two other theories under which it contends that the Secretary's action in canceling the leases should be declared invalid. First, Texas Oil & Gas argues that the Secretary should be estopped from invalidating its leases because plaintiff could have "top-filed" the lease applications after the August 1978 effective date of the amended section 3101.2-1, thereby depriving the Secretary of his legal justification for rescinding the leases, but did not do so in reliance on the oral representations of certain BLM officials about the validity of the applications as filed.

[6,7] It is established that the doctrine of estoppel is to be applied to the government only in the most extraordinary circumstances and with the greatest care and circumspection. *See, e.g., L'Enfant Plaza Properties, Inc. v. District of Columbia Redevelopment Land Agency,* 184 U.S.App.D.C. 30, 39, 564 F.2d 515, 524 (1977); *Hoeber v. District of Columbia Redevelopment Land Agency,* 483 F.Supp. 1356, 1366 (D.D.C.1980). This is especially so in instances relating to the public lands. *United States v. Eaton Shale Co.,* 433 F.Supp. 1256, 1272

[5] Charging a violation of due process, plaintiff also asserts that the Secretary's order invalidating its leases should be overturned because it was not afforded a hearing prior to their cancellation. Under the circumstances here, in which the Secretary invalidated leases that were issued subject to cancellation for defects like that strictly legal deficiency that was found to exist, the lack of a hearing fails to violate due process under either the fifth amendment, *see Gray v. Johnson,* 395 F.2d 533, 536-37 (10th Cir. 1966), *cert. denied,* 392 U.S. 906, 88 S.Ct. 2056, 20 L.Ed.2d 1364 (1968), or the Administrative Procedure Act, 5 U.S.C. §§ 553-554, *see, e.g., Public Serv. Co. v. FERC,* 195 U.S.App.D.C. 130, 141, 600 F.2d 944, 955 (1979); *Independent Bankers Assoc. v. Board of Governors of the Federal Reserve System,* 170 U.S.App.D.C. 278, 292, 516 F.2d 1206, 1220 (1975); *Citizens for Allegen County v. FPC,* 134 U.S.App.D.C. 229, 232, 414 F.2d 1125, 1128 (1969).

(D.Colo.1977). The party asserting an estoppel must not only establish that equitable principle's traditional elements—false representation, a purpose to invite action by the party to whom the representation was made, ignorance of the true facts by that party, and reasonable reliance—but must also make a showing of an injustice to him and a lack of undue damage to the public interest. *Hoeber v. District of Columbia Redevelopment Land Agency, supra,* 483 F.Supp. at 1365-66.

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[8] In applying this analytic framework to the circumstances of this litigation, it is apparent that the doctrine of estoppel is not appropriately invoked. Plaintiff's reliance upon alleged telephone conversations with BLM officials can hardly be called reasonable in light of the Interior Department's comments accompanying its proposal to amend section 3101.2-1, 42 Fed.Reg. 46558 (1977), which placed plaintiff on notice of the possibility of a departmental interpretation of section 3101.2-1 in line with that ultimately made by the Secretary in November 1979. *Cf. Udall v. Oelschlaeger,* 389 F.2d 974, 977 (D.C.Cir.), *cert. denied,* 392 U.S. 909, 88 S.Ct. 2056, 20 L.Ed.2d 1367 (1968). Moreover, while there is undoubtedly some injustice rendered plaintiff by the cancellation of its leases, it cannot be said that the decision of the Secretary is contrary or detrimental to the public interest in the equitable leasing of the public lands. Estoppel simply will not lie in this instance.

[9] Finally, relying on the seminal case of the United States Court of Appeals for the Fifth Circuit in *Pillsbury Co. v. FTC,* 354 F.2d 952 (5th Cir. 1966), and authority from this circuit, *American Public Gas Association v. FPC,* 186 U.S.App.D.C. 23, 567 F.2d 1016 (1977), *cert. denied,* 435 U.S. 907, 98 S.Ct. 1456, 55 L.Ed.2d 499 (1978); *D.C. Federation of Civic Associations v. Volpe,* 148 U.S.App.D.C. 207, 459 F.2d 1231 (1971), *cert. denied,* 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972), plaintiff asserts that the Secretary's action

should be reversed because it was improperly motivated by pressure from members of Congress. Although the content of the letters submitted to the Secretary by various Congressmen and Senators and the implication arising from the timing and subject matter of the subcommittee hearing in September 1979 can be termed "regrettable and quite inconsistent with that due regard for the independence of the [Secretary] which Congress and the courts must maintain," *American Public Gas Association v. FPC, supra,* 186 U.S.App.D.C. at 77, 567 F.2d at 1070, nonetheless this evidence, when taken as a whole, is insufficient to establish that the Secretary's decision was improper as rendered for political rather than policy reasons. *See, Sun Oil Co. v. United States,* 572 F.2d 786, 812-13 (Ct.Cl.1978); *American Public Gas Association v. FPC, supra,* 186 U.S.App.D.C. at 77, 567 F.2d at 1070. Accordingly, the Secretary's order cancelling plaintiff's leases must stand and plaintiff's requests for declaratory and injunctive relief are denied.

Having concluded that the Secretary's cancellation of plaintiff's leases must stand, the question of the validity of defendant's action in denying plaintiff a drilling permit for the Ft. Chaffee lands need not be reached.

EXHIBIT 2

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TEXAS OIL AND GAS CORPORATION,
Appellant,

v.

James G. WATT, Secretary of the United States Department of the Interior.
(Two cases)

Nos. 80-2297, 80-2302.

United States Court of Appeals,
District of Columbia Circuit.

Argued Nov. 2, 1981.

Decided June 11, 1982.

Lessee of oil and gas leases appealed from judgments of the United States District Court for the District of Columbia, 498 F.Supp. 668 and 677, Joyce Hens Green, J., upholding decisions of Secretary of the Interior cancelling oil and gas leases issued to lessee for parcels of land on military property and rejecting lessee's outstanding lease applications for lands at an Air Force base. The Court of Appeals, Mikva, Circuit Judge, held that the actions by Secretary were contrary to law and in excess of statutory authority where Congress had removed the exclusion which prohibited any mineral leasing on military lands from the Mineral Leasing Act for Acquired Lands, and where Secretary premised his decisions on regulations which required the rejection of applications if "for any reason the land has not been made subject, or restored, to the operation of the public land laws," in that removal of the military base exclusion "restored" or made such lands "subject" to leasing, and thus the lands were put outside the regulatory prohibition by the operation of law; thus, lessee's leases on the

military property had to be reinstated, and lessee had to be restored to its place at the head of the line for the leases on the Air Force base.

Reversed.

Mines and Minerals —5.1(3, 7)

Actions by Secretary of Interior in cancelling lessee's oil and gas leases for parcels of land on military property and rejecting lessee's outstanding lease applications for lands at Air Force base were contrary to law and in excess of statutory authority where Congress had removed exclusion which prohibited any mineral leasing on military lands from Mineral Leasing Act for Acquired Lands and where Secretary premised his decision on regulation which required the rejection of applications if "for any reason the land has not been made subject, or restored, to the operation of the public land laws," in that removal of military base exclusion "restored" or made such lands "subject" to leasing, and thus put such lands outside regulatory prohibition by the operation of law; thus, lessee's leases on military property had to be reinstated,

[683 F.2d 428]

and lessee had to be restored to its place at head of line for leases on Air Force base. Mineral Leasing Act for Acquired Lands, § 3(b) as amended 30 U.S.C.A. § 352(b); 5 U.S.C.A. § 706.

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action Nos. 79-02976 and 80-00488).

Bradley D. Jesson, Fort Smith, Ark., and Craig R. Carver, Denver, Colo., with whom John A. Carver, Jr., Denver, Colo., James W. McDade, Washington, D.C., Jason Warran, and Marilyn R. Saint-Just were on the briefs, for appellant.

Jerry Jackson, Atty., Dept. of Justice, Washington, D.C., with whom Jacques B. Gelin, Atty., Dept. of Justice, Washington, D.C., was on the brief, for appellee. James W. Moorman, Kay L. Richman, and Edward J. Shawaker, Attys., Dept. of Justice, Washington, D.C., also entered appearances for appellee.

Alan S. Novins, Washington, D.C., with whom Martin Lobel, Lee Ellen Helfrich, Washington, D.C., and Robert Roberts, III, Shreveport, La., were on the brief, for amicus curiae, Arkla Exploration Co., urging affirmance in No. 80-2297.

Before ROBB and MIKVA, Circuit Judges, and LUMBARD,* Senior Circuit Judge for the Second Circuit.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

This case involves appeals by Texas Oil & Gas Corp. ("TXO") from judgments of the district court upholding a decision of the district court upholding a decision of the Secretary of the Interior that cancelled oil and gas leases issued to TXO for parcels of land at Fort Chaffee, Arkansas; rejected TXO's outstanding lease applications for lands at Malmstrom Air Force Base in Montana; and declared a moratorium on oil and gas leasing of all lands acquired by the federal government for military or naval purposes. TXO challenges the district court's decisions with respect to all three elements of the Secretary's action. With regard to the cancellation of TXO's Lease and the rejection of its applications, we reverse. The issue concerning the leasing moratorium has become moot, so we do not address it.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

I. BACKGROUND

The statutory scheme for leasing federal government lands is somewhat complex. Congress first authorized mineral exploration and development of government lands in 1920, when it gave the Secretary discretionary authority to open "public domain lands" to leasing. Act of Feb. 25, 1920, ch. 85, 41 Stat. 437 (current version at 30 U.S.C. §§ 181-263 (1976)). Public domain lands, or public lands, means lands claimed by the United States as part of its national sovereignty. It was not until 1947 that Congress authorized mineral leasing on lands "acquired" by the federal government from private owners for various public purposes. Act of Aug. 7, 1947, ch. 513, 61 Stat. 913 (current version at 30 U.S.C. §§ 351-359 (1976)) ("Mineral Leasing Act for Acquired Lands" or "MLAA"). Under the 1947 legislation, "lands acquired by the United States ... [and] set apart for military or naval purposes" were excluded from leasing. *Id.* § 352. Under both statutes oil and gas leasing could be conducted by means of competitive bidding if the lands were within a known oil and gas field, or noncompetitively where the land, if leased at all, was to be leased to the first qualified applicant at $1.00 per acre per year (plus royalties if any oil or gas was found).

Pursuant to the military exclusion in the Mineral Leasing Act for Acquired Lands, the regulations of the Department of the Interior ("Interior") tracked the exclusion and prohibited any mineral leasing on military lands. 43 C.F.R. § 3101.2-1(f) (1976). In 1976 Congress removed the exclusion from the statute, thus making military lands subject to leasing at the Secretary's discretion. Federal Coal Leasing Amend-

[683 F.2d 429]

ments Act of 1975, § 12(a), Pub.L.No. 94-377, 90 Stat. 1090 (codified at

30 U.S.C. § 352 (1976)) ("the 1976 Amendments").[1] For the time being, Interior did nothing to alter its regulation as it had existed prior to the congressional action of 1976.

In May of 1977, some nine months after the 1976 Amendments, TXO, the appellant in this case, filed applications with Interior's Bureau of Land Management ("BLM") for noncompetitive oil and gas leases on lands at Fort Chaffee in Arkansas and Malmstrom Air Force Base in Montana. It was not until four months after TXO had filed its applications that the BLM began the process of changing its pre-1976 regulation that had tracked the statutory prohibition on leasing military lands. The BLM published a notice of proposed rulemaking in the Federal Register (hereinafter, "the 1977 Notice"), which proposed to alter Regulation 3101.2-1 to reflect the 1976 Amendments. 42 Fed.Reg. 46,558 (1977). The 1977 Notice announced in its "Summary" section that the proposed rule would "authorize the Department of the Interior to lease lands acquired for military or naval purposes," *id.*, and that amending § 3101.1 "would reflect the authority granted the Department by section 12(a) of the Federal Coal Leasing Amend-

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[1] Prior to the 1976 Amendment, the statute read in pertinent part as follows:

> Except where lands have been acquired by the United States for the development of the mineral deposits, by foreclosure or otherwise for resale, or reported as surplus pursuant to the provisions of the Surplus Property Act of 1944, all deposits of coal, phosphate, oil, oil shale, gas, sodium, potassium, and sulfur which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States (exclusive of such deposits in such acquired lands as are (a) situated within incorporated cities, towns and villages, national parks or monuments, (b) *set apart for military or naval purposes*, or (c) tidelands or submerged lands) may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof.

(Emphasis added.) The amendment merely deleted exception (b) and redesignated exception (c) as exception (b).

ments Act of 1975 .... This regulation would increase the amount of land available for oil and gas leasing," *id.* In addition, the following statement was made under the heading "Supplementary Information:"

> Section 12(a) of the Federal Coal Leasing Amendments Act of 1975 ... repealed the prohibition against the leasing proposed here. The regulatory prohibition reflecting the old statutory provision remains in effect, serving as an exercise of the Secretary's new authority to lease or not to lease such deposits.

Id. The amendment to the regulation itself became effective in September 1978, *see* 43 Fed.Reg. 37,202 (1978).

Notwithstanding the 1977 Notice, which would seem to have frozen any such leasing until the rulemaking was completed, the BLM proceeded to process TXO's applications. In July 1979, the company received twenty out of thirty-eight leases sought at Fort Chaffee.[2] The Malmstrom Air Force Base applications initially were denied,[3] but

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[2] Eighteen applications were rejected because the lands covered by them were found to be within a known geological structure and therefore subject to leasing only on the basis of competitive bidding.

[3] Initially the Malmstrom applications were rejected by an official in the Montana branch office of the BLM, on the ground that the Mineral Leasing Act for Acquired Lands excluded the lands involved from leasing. *See* Appendix (App.) to No. 80-2302, at 40. TXO brought the 1976 Amendments to the attention of this official, whereupon he vacated his earlier decision. *See id.* at 45. Next, the commander of the Malmstrom Air Force Base, whose consent as the official in charge of the surface of the original lands in question was necessary before a lease could be granted, *see* 30 U.S.C. § 352 (1976), decided that national security considerations dictated that no leasing should take place. TXO then persuaded the base commander to reconsider his decision and consult with Department of Defense officials with regard to it. *See* App. to No. 80-2302, at 49. Meanwhile the BLM held in abeyance its decision rejecting the applications because of the commander's lack of consent, pending a possible different result after review by the Department of Defense. *See id* at 51-52. That still was the status of the Malmstrom applications when the Secretary endeavored to reject them on November 1, 1979.

they were held for further consideration and a final decision with regard to them was pending during the summer of 1979.

The grant of the twenty leases at Fort Chaffee generated some negative publicity, as well as a "protest" from another company, Arkla Exploration Company (Arkla).[4] From August to October, 1979, a number of Senators contacted then-Secretary of the Interior Andrus to express their dissatisfaction with the BLM's noncompetitive mineral leasing procedures in general and with the grant of the Fort Chaffee leases in particular.[5] *See* Letters to Secretary Andrus from Senator

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[4] Arkla next filed a suit in district court seeking to have the Fort Chaffee leases declared invalid. *Arkla Exploration Co. v. Andrus*, Civ. No. 79-2501 (D.D.C. filed September 21, 1979). Its suit was held in abeyance pending the decision of the district court in the case before us, and then it was dismissed without prejudice.

Arkla was granted leave to file a brief *amicus curiae* in the instant case and to participate in oral argument. Arkla adopted the Secretary's arguments and urged in addition that the Fort Chaffee leases were void *ab initio* because their issuance was the result of a secret repeal of the pre-amendment Department of the Interior regulations at 43 C.F.R. § 3101.2-1, in violation of the publication requirements set forth in the Administrative Procedure Act, 5 U.S.C. § 552(b) (1976). We must reject Arkla's argument, because our holding with regard to the effect of the 1976 statutory amendment means that it was possible for leasing to take place without a change in the regulation at § 3101.2-1.

[5] In In addition, Senator Wendell H. Ford called a hearing for the express purpose of considering the Fort Chaffee leases. *See* Letter to Secretary Andrus from Senator Ford, August 14, 1979, App. to No. 80-2297, at 94. The Interior Department officials designated by Secretary Andrus to testify at the hearing all expressed the view that the Fort Chaffee leases had been issued in accordance with law. *See e.g., Oil and Gas Leasing of Lands Belonging to Fort Chaffee, Arkansas: Hearings Before the Subcommittee on Energy Resources and Materials Production of the Senate Committee on Energy and Natural Resources*, 96th Cong., 1st Sess. 50-56 (1979) (Statement of Donald P. Truesdell, Acting Asst. Director for Energy and Mineral Resources, BLM, *quoted in text, infra)* (hereinafter cited as *Fort Chaffee Hearings)*.

Bumpers, August 8 and 10 and September 14, 1979, Appendix (App.) to No. 80-2297, at 90, 92, 101; from Senators Jackson, Ford, Bumpers, and Bellmon, September 13, 1979, *id.* at 95; from Senators Jackson, Bumpers, and Bellmon, September 17, 1979, *id.* at 103; from Senator Long, October 1, 1979, *id.* at 106; from Senators Long and Johnson, October 25, 1979, *id.* at 107.[6] In his responses to these communications, Secretary Andrus indicated that he, too, was not satisfied with the way noncompetitive leasing was being carried out. He stated, however, that the TXO leases had been granted in accordance with law:

> Until 1976, there was no authority to lease, either competitively or noncompetitively, acquired lands within the boundaries of military reservations. Section 12 of the Federal Coal Leasing Amendments Act of 1975 amended section 3 of the Mineral Leasing Act for Acquired Lands (30 U.S.C. 351, 352) to permit oil and gas leasing on such lands and because of energy needs, there were efforts made to pursue such leasing. As a result, the lands within Fort Chaffee were open to application for noncompetitive leases just like other acquired lands. In May of 1977, the Texas Oil and Gas Company filed approximately 50 such applications for land within the Fort. Thirty of the applications were either rejected or withdrawn by the company because either 1) the Army refused to permit leasing, 2) it was determined that there were no Federal mineral interests within the application area or 3) the USGS had identified the areas as a KGS [Known Geological Structure]. Because the company was the first qualified applicant on the other 20 lease applications and the lands were not qualified as a KGS, leases were issued by the Bureau of Land Management on these tracts according to routine procedures of the noncompetitive leasing system.
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> [683 F.2d 431]

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[6] The record indicates that TXO was itself not without some congressional allies in this affair. *See* Letter to Secretary Andrus from Representative Wright, Senator Bentsen, and Representative Frost, September 28, 1979, App. to No. 80-2297, at 274.

> In summary, these leases were issued pursuant to law as part of a program which was functioning on a regular basis.

Letter from Secretary Andrus to Senator Bumpers, August 13, 1979, App. to No.80-2297, at 68, 68-69.

On September 20, 1979, Secretary Andrus issued a memorandum to the Director of the U.S. Geological Survey, instructing him to review earlier geological determinations with regard to TXO's Fort Chaffee applications and not to approve any applications for drilling permits on the lands leased to TXO. *See* App. to No. 80-2297, at 118. The company interpreted this move as a concession to political pressure and began to fear that the Secretary would attempt to rescind the Fort Chaffee leases. Consequently TXO sought a temporary restraining order in the district court on November 1, 1979, so as to prevent the Secretary from ordering such a rescission.

The application for a TRO was set for oral argument on November 2, 1979. On the evening of November 1, however, Secretary Andrus issued a decision in which he cancelled the twenty Fort Chaffee leases and rejected all pending applications for leases on lands acquired for military or naval purposes that had been filed prior to September 21, 1978, the effective date of the new Department regulation tracking the 1976 amendment to the MLAA. *See* App. to No. 80-2297, at 139, 140-41. In addition, he declared a moratorium on the leasing of all acquired military and naval lands, pending a full reevaluation of the noncompetitive leasing procedures. *Id.*

The status quo thus having been altered, the district court determined that it could not grant a TRO, but that TXO could amend its complaint to convert the suit into one for permanent relief. TXO did so. The company also brought a separate suit with respect to the rejection of the Malmstrom Air Force Base applications and the general leasing moratorium.

In two memorandum opinions issued on September 25, 1980, *Texas Oil & Gas Corp. v. Andrus*, 498 F. Supp. 668 (D.D.C. 1980); *id*, at 677, the district court found for the Secretary on his cross-motions for summary judgment. TXO appealed from both decisions, and its appeals were consolidated. For the reasons indicated below, we reverse in both cases.

II. DISCUSSION

TXO maintained below and reiterates on this appeal that the Secretary erred in thinking that his regulations required him to cancel the Fort Chaffee leases and reject the Malmstrom applications. The district court treated this issue of the Secretary's duty as hinging on an agency's interpretation of its own regulations. While the court was of the opinion that other interpretations were plausible, it nevertheless decided that the Secretary's interpretation was owed considerable deference and should be accepted because it was reasonable.

We conclude that the district court's approach led it to an erroneous result. In view of the circumstances of this case, we believe that the Secretary's eleventh-hour interpretation of his duty is owed no great degree of deference. Based on our examination of the statutory language that is relevant to this case, we have little trouble in concluding that the Secretary was mistaken in believing that he was required to act as he did. His actions merit reversal because they were contrary to law and in excess of statutory authority under 5 U.S.C. § 706 (1976). Consequently TXO's Fort Chaffee leases were validly issued and must be reinstated, and the company must be restored to its place at the head of the line for the Malstrom leases.

A. *The Rationale for the Secretary's Action*

The Secretary premised his decision to cancel the Fort Chaffee leases and to reject the pending Malmstrom applications on the imperative language of Section 2091.1 of the Interior Department regulations, which requires the rejection of applications if "for any reason the land has not been made subject, or restored, to the operation of the public land laws." 43 C.F.R. § 2091.1

[683 F.2d 432]

(1981). We think the Secretary's reliance on the language and meaning of the Departmental regulations was misplaced. From the time of the amendment of the statute by Congress until November 1, 1979, when the Secretary cancelled TXO's leases, the Department consistently and positively took the position that the military lands were open for leasing, in the Secretary's discretion. This interpretation of the law was expressed in rulings, letters, and instruction memoranda by department officials, including the Associate Solicitor for Energy and Resources. *See* App. to No. 80-2297, at 58. As mentioned, *see* Part I *supra,* the Secretary himself took that position in a letter to Senator Bumpers. And on September 12, 1979, Donald P. Truesdell, BLM Acting Assistant Director for Energy and Mineral Resources, testified before the Subcommittee on Energy Resources and Materials, as follows:

> In view of this change in the law, even though the regulations had not been amended to reflect the change, the Eastern States Office [of the BLM] would have had no basis to reject the applications.
>
> It is our view that the law itself was record notice to all interested parties and all had an opportunity to file. As has been previously stated, over 800 applications have been filed so far that we are aware of, by 25 to 30 companies. They are still coming in. These figures cover military reservations throughout the United States.

Fort Chaffee Hearings, supra note 5, at 52. Even if the Department had not so construed the statutory situation, we would be obliged to do so.

The prevention of the approval of lease applications turns on our being able to find that the lands in question were not "subject, or restored, to the operation of the public lands laws." Our examination of this key phrase can proceed without our sharing the district court's deference to the Secretary's interpretation. We are not dealing with the situation where an agency's construction of its own regulation normally will defeat other plausible constructions, *see, e.g., Belco Petroleum Co. v. FERC*, 589 F.2d 680, 686 n.5 (D.C. Cir. 1978). Instead, we are considering the proper construction of a *statute*, because it is necessary to interpret the 1976 Amendments in order to decide what the regulation means.[7] If the 1976 Amendment is interpreted to have subjected acquired military or naval lands to the public lands laws, then we must reject the Secretary's assertion that only his discretionary decision to open lands for leasing accomplishes that result.

Clearly the 1976 Amendments that removed the military base exclusion "restored" or made these lands "subject" to leasing. They clearly were put outside the regulatory prohibition by the operation of law. The Secretary urges that this plain meaning is thwarted by the impact of the explanatory material accompanying his 1977 proposal to amend Section 3101.2-1 of the regulations. The explanatory language purported to freeze any leasing pending the rulemaking by "serving as an exercise

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[7] We proceed here from the awareness that "the courts are the final authorities on issues of statutory construction," *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 102 S.Ct. 38, 70 L.Ed.2d 23 (1981). We also are mindful that the "thoroughness, validity and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling," *id.* at 37, 102 S.Ct. at 44. Given the circumstances of the case before us, however, we conclude that such factors suggesting a deferential approach on our part are wholly absent. In particular, with regard to the criterion of consistency we point out that the Secretary's decision contradicts his own earlier statements, *see* Letter from Secretary Andrus to Senator Bumpers, Aug. 13, 1979, App. to No. 80-2297, at 68, 68-69, *quoted in text supra*, Part I, and is inconsistent with BLM practice from 1977 on.

of the Secretary's new authority to lease or not to lease such deposits." The Secretary exceeds his authority when he equates his discretion with the impact of the statutory amendments of 1976.

In the 1976 Amendments, language excluding a category of acquired lands from a

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statute allowing for leasing merely was stricken out of the statute. This does not mean that the lands must be leased, for that decision indisputably is in the Secretary's discretion. Nevertheless, the Secretary's decision to announce that certain lands are "available" cannot logically constitute subjection of the lands to the operation of the statute. The very existence of discretion—once absent with regard to lands acquired for military or naval purposes, but now present—is established by the statute and by the statute alone. There is no relevance to the fact that the various details relating to mineral leasing prescribed by statute come into play only if and when the Secretary has decided to lease certain lands. The alteration of the lands' status, from one in which leasing is prohibited to one in which it is allowed, has already been brought about by statute.[8] That alteration clearly is the result

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[8] We note further that 30 U.S.C. § 226 (1976), headed "Lease of oil and gas lands," refers to the Secretary's authority to lease "[a]ll lands subject to disposition under this chapter." And the Secretary's own current regulation tracking this statutory provision with regard to acquired lands employs language that is even easier to equate with the phrase "made subject to the operation of the public land laws." In 43 C.F.R. § 3101.2-1 (1981), "Availability of lands," we encounter the phrase "lands subject to disposition under the [Mineral Lands Leasing] Act."

of the "operation" of the 1976 Amendment on the lands in question.[9]

We find it impossible, therefore, to agree with the Secretary's interpretation of his regulation at 43 C.F.R. § 2091.1(e). To do so would require us to interpret the current section 352 of the Mineral Leasing Act for Acquired Lands in a way that defies common sense and the ordinary meaning of words. When Congress speaks, its words become law at that time, not when someone else repeats the message later on.

In addition, we note that an interpretation such as that advanced by the Secretary, which would allow for statutory amendments to become effective only after agency tracking regulations have been changed to reflect the statute in its current version, would work mischievous results that cannot have been intended by Congress. Persons affected by statutes implemented by agency discretion would not know where to look to determine when and to what extent the status quo had been altered. And we cannot allow an agency to ignore a statutory amendment for a time and later claim, as here, that regulations based on the unamended statute render void any actions taken in accordance with the clear language of the

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[9] Indeed, it is not surprising that the Secretary himself has described the effect of the 1976 Amendment in terms that accord with our interpretation. In his memorandum to the Director of the BLM instituting the moratorium on oil and gas leasing on acquired lands, which was attached to the November 1, 1979, decision cancelling TXO's leases and rejecting its applications, the Secretary stated that "[t]hese lands were made subject to the Mineral Leasing Act for Acquired Lands by section 12(a) of the Federal Coal Leasing Amendments Act of 1976." App. to No. 80-2297, at 142 (citations omitted).

amended statute.[10] An agency possessed of discretion may exercise it or not; but it may not exercise it and then take back its action on the ground that, based on the duty to adhere to its own regulations irrespective of

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what the statute says, it lacked the discretion in the first place.

It may be argued that the authority to reject—that is, to refuse to accept for filing—premature applications necessarily inheres in the authority to decide which lands to lease. If specific parcels of land have not yet been made available for the granting of leases, then there may be no reason for the Secretary to allow applications covering them to be filed. Indeed, considerations of efficiency in the utilization of personnel and office space suggest that it would be in the interest of the BLM not to allow filing of applications in advance of an announcement that leasing will take place. Even if such authority is found to exist, however, it cannot serve as the basis for the Secretary's action in this case. Otherwise we would be

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[10] The explanatory material in the 1977 notice of proposed rulemaking, quoted in Part I *supra*, does not alter this conclusion. TXO's applications were filed after the 1976 statutory amendment and were processed after the new regulation at 43 C.F.R. 3101.2-1 became effective in September 1978. The notice could have been viewed as an expression of Interior Department policy prior to the effective date of the new regulation, and perhaps therefore as a basis for rejection of premature applications at the time of filing. But the notice itself was not a rule, and it referred only to *leasing*, with no mention whatever of *filing*. The BLM's action—or inaction—in retaining TXO's applications could certainly have been regarded by the company as an indication that the applications were not prematurely filed, thus rendering unnecessary a refiling after September 21, 1978. In any event, the record appears to indicate that the company actually did approach the BLM for guidance on the refiling question, and was assured that refiling would not be necessary. *See* Affidavit of Lin Patterson, TXO Assistant General Counsel, Jan. 11, 1980, App. to No. 80-2297, at 75.

sanctioning a retroactive exercise of discretion to which it is impossible to ascribe any rational purpose. It may well be prudent and efficient for the Secretary to refuse to accept premature applications; but accepting them for filing and processing them after September 21, 1978, when a regulation opening lands for leasing went into effect, strips a *later* rejection on prematurity grounds of all possible benefit to the BLM. Moreover, the effort spent in processing the application is entirely wasted; a net *loss* in efficiency results.

B. *Political Impropriety*

TXO vigorously contends that the Secretary's action was the result of improper political pressure on the part of several Senators. The district court termed the role of the Senators " 'regrettable and quite inconsistent with that due regard for the independence of the [Secretary] which Congress and the courts must maintain,' " 498 F.Supp. at 677 (quoting *American Public Gas Association v. FPC*, 567 F.2d 1016, 1070 (D.C.Cir.1977), *cert. denied*, 435 U.S. 907, 98 S.Ct. 1456, 55 L.Ed.2d 499 (1978)). The court declined to conclude, however, that the Secretary's action was so improper that a reversal was required on that ground alone. We need not decide for ourselves whether the Secretary's capitulation to political pressure would require us to overturn his actions, because we have found a separate ground for reversal. We note, however, that while the frequent and forceful communications by several Senators amounted to "pressure" in a general sense and indeed may be regarded as "regrettable," they did not contain anything like the sort of threats that this court has suggested could serve as evidence of improper motivation for an agency's action. *See D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1245–48 (1971), *cert. denied*, 405 U.S. 1030, 92 S.Ct. 1290, 31 L.Ed.2d 489 (1972).

C. *The Moratorium*

TXO challenges the Secretary's general moratorium on leasing of lands acquired for military or naval purposes, on the theory that the action was not in conformity with the procedural requirements of the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782 (1976). The district court concluded that TXO, having lost on its challenge to the rejection of its pending lease applications, no longer had any applications pending and therefore lacked standing to challenge the imposition of the leasing moratorium. An intervening event moots this issue. Effective August 10, 1981, the Department of the Interior lifted the leasing moratorium with respect to lands for which no applications had been filed prior to September 21, 1978, when the new Department regulation tracking the 1976 statutory amendment went into effect. *See* 46 Fed.Reg. 37,250 (July 20, 1981). As indicated in an Interior Department memorandum of June 5, 1981, filed with this court, the moratorium remains in place with regard to lands covered by pre-September 21, 1978 applications, pending the outcome of this and any other relevant litigation. At that time the moratorium will be lifted from those lands as well, and noncompetitive leasing will proceed, with priorities to be assigned in accordance with the courts' decisions. Consequently there is no longer any reason to determine whether the moratorium was lawful in the first place.

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D. *Remedy*

The first consequence that flows from our decision is that the Fort Chaffee leases must be reinstated. We have rejected the Secretary's proffered rationale for cancellation; the leases were valid when issued. And there is no suggestion in this case of the sort of conduct on the part of the lessee, such as default on royalty payments, that would justify cancellation under 43 C.F.R. § 3108.3 (1981). Therefore the validity of the issued leases continues undiminished. In addition, we see no reason why TXO should not receive favorable action on its appli-

cations for drilling permits on two of the leased parcels at Fort Chaffee, which have been held in abeyance since September 20, 1979.

With regard to the Malmstrom applications, which the Secretary improperly rejected, they must have priority over junior applications, *if* the Secretary proceeds with noncompetitive leasing under the procedure dealing with "regular" applications. This conclusion plainly is required by statute and regulation. The provision of the mineral leasing laws that applies to the leasing of acquired lands states unequivocally that where leasing is to take place, and the land is "not within any known geological structure [KGS] of a producing oil or gas field," then "the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease." 30 U.S.C. § 226(c) (1976). And the current regulation dealing with the determination of priorities with regard to regular filing in the noncompetitive leasing scheme tracks the statute, stating that "[n]o lease shall be issued before final action has been taken on any prior offer to lease the land." 43 C.F.R. § 3110.1-6(a) (1981). Because the Malmstrom lands have not been found to be within a KGS, and because there is no dispute with regard to whether TXO is a "qualified" applicant as that term is used in the regulations at 43 C.F.R., Subpart 3102 (1981), final action on the company's applications will result in the issuance of leases.

The record in this case does not disclose whether there are any applications for the Malmstrom lands that are junior to those filed by TXO. To the extent that there may be such applications that were filed after September 21, 1978, in reliance on the Secretary's 1977 notice of proposed rulemaking, they will not be accorded a priority because TXO has the *statutory* priority as the applicant that was first to file.

III. CONCLUSION

This case very likely would not have arisen if the Secretary had pursued a consistent policy of rejecting mineral lease applications before there had been a public announcement that particular parcels of land were available for leasing. And it assuredly would not have arisen if the Secretary had not engaged in a hasty attempt, based on politically suspect motives at worst and on a legally erroneous theory at best, to undo what had been done. As matters stand, TXO must have its twenty Fort Chaffee leases, and it must be returned to its place at the head of the queue for leases at Malmstrom Air Force Base.

The judgments appealed from are

Reversed.

EXHIBIT 3

FILED
OCT. 10, 1980
JAMES E. DAVEY, CLERK

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARKLA EXPLORATION COMPANY,
Plaintiff,

v.

Civil Action
No. 79-2501

CECIL D. ANDRUS, Secretary
of the Interior,
Defendant.

ORDER

In consideration of the stipulation of the parties for an indefinite stay of the proceedings in this matter pending final appellate action in the case of *Texas Oil & Gas Corp. v. Cecil Andrus,* Civil Action No. 79-2976, Stipulation Subject to Court Approval, October 8, 1980, and in consideration of the uncertainty of the timing of appellate review, the Court finds that it is more appropriate, and it is this 10th day of October, 1980, hereby

ORDERED, that the above-captioned cause is dismissed without prejudice, and with all rights preserved to each party.

/S/ JOYCE HENS GREEN

Joyce Hens Green
United States District Judge

EXHIBIT 4

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ARKLA EXPLORATION CO., et al., Plaintiffs,

v.

James G. WATT, Secretary of the United States Department of the Interior, and Texas Oil and Gas Corp., Defendants.

Civ. No. 82-2168.

United States District Court,
W. D. Arkansas,
Fort Smith Division.

Sept. 20, 1982.

Exploration company brought action challenging the granting of oil company's application for oil and gas leases on military lands. On government's motion to dismiss, the District Court, H. Franklin Waters, Chief Judge, held that: (1) exploration company and state had standing to seek district court's review; (2) the action was not barred by doctrine of collateral estoppel; (3) action was not barred by doctrine of exhaustion of administrative remedies; (4) action was not time barred; and (5) district court would base its decision on the administrative record, and the cause would not be tried de novo.

Order accordingly.

1. Federal Civil Procedure —103

Congress may enact statutes which create legal rights, the invasion of which creates standing, even though no injury would exist without the statute.

2. Federal Civil Procedure —103

The true test of standing is whether parties seeking to invoke court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult questions.

3. Federal Civil Procedure —103

Exploration company had standing to bring suit for equitable and declaratory relief protesting Secretary of Interior's issuance of oil and gas leases on military lands, since exploration company asserted a right to bid competitively on tracts of land which Secretary had reasonably classified and offered, and evidence submitted showed a substantial likelihood existed that exploration company had been harmed by the procedures employed.

4. Federal Civil Procedure —103

District court will not lightly deny standing when there is causal connection between claimed injury and challenged conduct; substantial likelihood exists that relief requested may redress injury suffered; and there is such a palpable injury present that millions of dollars may be affected by the actions complained of.

5. Federal Civil Procedure —338

State had standing to intervene in suit challenging the granting of oil company's application for oil and gas leases on military lands, since state would receive 50% of all money received from sales, bonuses, royalties and rentals of public lands involved in the litigation, and if the military land at issue was irrationally classified as non-KGS areas, the state would lose one-half of all money which would have been received from the rental of those lands.

6. Mines and Minerals — 5.1(9)

Exploration company challenging the granting of oil company's application for oil and gas leases on military lands, as well as state in which such lands were located, had cause of action to challenge the agency action, since exploration company qualified as aggrieved party adversely affected by the challenged agency action, and state could attack allegedly capricious determinations by agency affecting the state's payments under Mineral Lands Leasing Act. Mineral Lands Leasing Act, § 35 as amended 30 U.S.C.A. § 191; Mineral Leasing Act for Acquired Lands, § 6 as amended 30 U.S.C.A. § 355; Department of Energy Organization Act, § 2 et seq., 42 U.S.C.A. § 7101 et seq.; 5 U.S.C.A. §§ 702, 704; 28 U.S.C.A. § 1331.

7. Judgment — 634

Exploration company's claims challenging the granting of oil company's application for oil and gas leases on military lands were not barred by doctrine of collateral estoppel, since exploration company was neither a party to prior litigation involving the application nor in "privity" with a party, and since exploration company raised new issues not litigated in the previous proceedings.

8. Mines and Minerals — 5.1(9)

Doctrine of exhaustion of administrative remedies did not preclude exploration company's suit challenging the granting of oil company's application for oil and gas leases on military lands, since exploration company had in fact pursued administrative remedies when required and available, and any further administrative proceedings would be futile and of no benefit to anyone.

9. Mines and Minerals — 5.1(9)

Exploration company's suit challenging the granting of oil company's application for oil and gas leases on military lands was not time barred, since exploration company was not "adversely affected" by a final administrative decision until Secretary's issuance of leases was ordered reinstated, and exploration company's suit was filed within 90 days after Secretary was ordered to reinstate the leases. Mineral Lands Leasing Act, § 42 as amended 30 U.S.C.A. § 226-2.

10. Federal Civil Procedure — 338

School districts would not be permitted to intervene in exploration company's suit challenging the granting of oil company's application for oil and gas leases on military lands, since school district's claims were practically identical to those of the state, which had been permitted to intervene, and the addition of further parties to the action would delay and complicate the prompt adjudication of parties' respective interests.

11. Mines and Minerals — 5.1(9)

In exploration company's suit challenging the granting of oil company's application for oil and gas leases on military lands, district court would base its decision on administrative record and the cause would not be tried de novo; however, supplementary materials would be received to show the adequacy or inadequcy of facts considered by Secretary of Interior, to supply court with sufficient technical expertise to aid court in understanding the complex issues involved, and to show the true scope of record and procedures employed by Secretary in reaching his decision.

Jim Guy Tucker, Mitchell, Williams & Selig, Little Rock, Ark., Alan S. Novins, Lee Ellen Helfrich, Lobel, Novins &

Lamont, Washington, D.C., Robert Roberts, III, Blanchard, Walker, O'Quin & Roberts, Shreveport, La., for plaintiff, Arkla Exploration Co.

Steve Clark, Atty. Gen. and Roger W. Giles, Asst. Atty. Gen., Little Rock, Ark., for plaintiff-intervenor, State of Ark.

W. Asa Hutchinson, U.S. Atty., Fort Smith, Ark., Andrew F. Walch, Patricia J. Beneke, Land and Natural Resources Div., Washington, D.C., Mark K. Seifert, Energy and Resources Division, Dept. of the Interior, Washington, D.C., for defendant, James G. Watt.

Bradley D. Jesson, Robert T. Dawson, Hardin, Jesson & Dawson, Fort Smith, Ark., Craig R. Carver, Gibson, Dunn & [548 F.Supp. 468] Crutcher, Denver, Colo., for defendant, Texas Oil and Gas Corp.

MEMORANDUM OPINION

H. FRANKLIN WATERS, District Judge.

I. *Historical Background and Factual Summary*

Congress first authorized mineral exploration and development of government land in 1920, when it gave the Secretary discretionary authority to open "public domain lands" to leasing. 30 U.S.C. §§ 181-263. In 1947 Congress authorized mineral leasing on lands "acquired" by the federal government from private owners. 30 U.S.C. §§ 351-359. Under the 1947 Act, lands acquired by the United States and set apart for military or naval purposes were excluded from leasing. 30 U.S.C. § 352.

Pursuant to the exclusion of military lands, Department of the Interior regulations tracked the exclusion and prohibited any mineral leasing on military lands. 43 C.F.R. § 3101.2-1(f).

In 1976 Congress removed the exclusion from the Statute, thus making military lands subject to availability for leasing at the Secretary's discretion. 30 U.S.C. § 352 (Federal Coal Leasing Amendments Act of 1975). The Department of the Interior failed to contemporaneously alter its regulations which prohibited mineral leasing.

In 1977, the Bureau of Land Management began the process of changing its pre-1976 regulations. The Bureau published a notice of proposed rulemaking in the Federal Register, proposing to alter Regulation 3101.2-1 so as to reflect the 1976 Amendments. *See* 42 Fed.Reg. 46,558 (1977). The 1977 Notice declared that the proposed rule would authorize the Department of the Interior to lease lands acquired for military or naval purposes, reflecting the authority granted by the Federal Coal Leasing Amendments Act, increasing the amount of land available for oil and gas leasing. The "Supplementary Information" of the 1977 Notice declared that the regulatory prohibition reflecting the old statutory provision remained in effect, serving as an exercise of the Secretary's authority to lease or not to lease such lands. The regulatory amendments became effective in September, 1978. *See* 43 Fed.Reg. 37,202 (1978).

In May of 1977, Texas Oil and Gas Corp. (TXO) filed applications with the Bureau of Land Management for noncompetitive oil and gas leases on lands at Fort Chaffee. It was four months later that the Bureau began to change the pre-1976 regulations.

Even though the 1977 Notice had frozen any leasing until the rulemaking was completed, the Bureau proceeded to process TXO's applications.

In August of 1977, the Department of Energy Organization Act, 42 U.S.C. § 7152, transferred the authority to promulgate regulations under the Mineral Lands Leasing Act and the Mineral Leasing Act for Acquired Lands from the Secretary of

the Interior to the Secretary of Energy, for the purpose of fostering competition for federal leases. The Department of Energy Organization Act requires the Secretary of the Interior to afford the Secretary of Energy at least thirty (30) days to disapprove any term or condition which related to any matter with respect to any matter within the new purview of the Secretary of Energy.

On June 26, 1979, TXO's applications, dated May 6, 1977, were accepted by the Chief, Division of Lands and Minerals, Bureau of Land Management, on behalf of the United States and with the consent of the Corps of Engineers, and twenty (20) leases were issued to TXO with an effective date of July 1, 1979.

Arkla filed a "protest" of the Secretary's issuance of these leases on September 17, 1979, and four days later filed suit in the District Court for the District of Columbia and the Western District of Arkansas. Subsequently, on September 20, 1979, the Secretary directed the U.S. Geological Survey of the Bureau of Land Management to re-evaluate its non-KGS classification of the leased land. Consequently, TXO sought a temporary restraining order on November 1, 1979. The TRO hearing was scheduled for November 2, 1979. On the evening of

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November 1, the Secretary issued a decision in which he cancelled the twenty (20) Fort Chaffee leases and rejected all pending applications that had been filed prior to September 21, 1978, the effective date of the Department's new regulations in accordance with the 1976 amendment to the Mineral Leasing Act for Acquired Lands, and further declared a moratorium on the leasing of all acquired military lands pending full re-evaluation of the leasing procedures.

Arkla's "protest" was then dismissed as moot. TXO subsequently amended its complaint to convert the suit to one for permanent relief.

The District Court for the District of Columbia issued two memorandum opinions on September 25, 1980, *Texas Oil and Gas Corp. v. Andrus,* 498 F.Supp. 668 (D.D.C. 1980), finding for the Secretary on his cross-motions for summary judgment. The decisions were consolidated for appeal.

The United States Court of Appeals for the District of Columbia reversed on June 11, 1982, holding that the Secretary, in cancelling the leases, acted in excess of his authority. The court reasoned that the 1976 Amendments made the lands in question immediately subject to leasing, without any regulatory implementation being necessary.

On July 30, 1982, the District Court was mandated to issue an order directing the Secretary of the Interior to reinstate the leases.

On August 4, 1982, Arkla refiled the instant action raising issues not considered by the District of Columbia courts, seeking equitable and declaratory relief.

Subsequently, the government stipulated, with the approval of TXO and all parties, to take no action to change the status of the matter until at least September 30, 1982.

Both the government and TXO moved to dismiss Arkla's complaint, raising issues of standing, unavailability of a private cause of action, collateral estoppel, exhaustion, and statute of limitations. The Court, after consideration of the briefs submitted, orally advised the parties of the Court's intention to deny the motions to dismiss.

Subsequently, the State of Arkansas moved to intervene, as well as Greenwood School District No. 25, Lavaca School District No. 3, Charleston School District No. 9, and Fort Smith Special School District. On September 9, 1982, the Court orally advised the parties that the State of Arkansas would be permitted to intervene, but that the motions of the school districts for intervention were to be denied.

The government and TXO also moved to limit this Court's review to the administrative record. After reviewing the arguments, the Court advised the parties that review would be limited to the record, but that the record could be supplemented as necessary to show the adequacy or inadequacy of the facts considered by the Secretary as well as the procedures utilized by the Secretary in reaching his decisions, and to provide the Court with sufficient technical expertise to allow the Court to understand the complex factual issues presented.

Pursuant to these rulings, the Court issues this Memorandum Opinion. The issues raised will be discussed in turn.

II. *Discussion*

A. *Standing*

The government and TXO assert that Arkla lacks standing to seek this Court's review, relying primarily upon *Geosearch v. Andrus*, 508 F.Supp. 839 (D.Wyo.1981), and *Pullman v. Chorney*, 509 F.Supp. 162 (D.Colo.1981), among others.

In *Geosearch*, *supra*, the District Court of Wyoming found standing lacking. In that case, the plaintiff, Geosearch, was an organization which actively searched for defects in the offer of the first drawee of non-KGS tracts of land for oil and gas leases. If their protest was successful, and if the lease was reissued to the second drawee, Geosearch retained a percentage in the lease. However, the first drawees had previously assigned the leases to *bona fide* purchasers in several of the situations presented, and in others had failed to timely file a "protest."

Standing was found lacking because:

> In order to have standing, Geosearch must prove that it has an injury in fact that is likely to be redressed by a favorable decision of the court. *Citizens Concerned For Separation of Church and State v. City and County of Denver,* 628 F.2d 1289 (10th Cir. 1980); *Duke Power Co. v. Carolina Env. Study Group, Inc.,* 438 U.S. 59 [98 S.Ct. 2620, 57 L.Ed.2d 595] (1978). *See also Data Processing Service v. Camp,* 397 U.S. 150 [90 S.Ct. 827, 25 L.Ed.2d 184] (1970). Even if Geosearch could demonstrate any irregularities in the issuance of the leases to the first drawees, and this Court does not so hold, the leases, if cancelled, would not be reissued to Geosearch. Under the regulations, the cancelled leases would be withdrawn, offered at a competitive bid or subjected to a new simultaneous drawing. *See* 43 C.F.R. § 3112.1. Geosearch cannot demonstrate any injury in fact and, therefore, has no standing.

Id. at 845.

Thus, because the court was unable to award the relief requested and because Geosearch claimed an abstract right to the leases, standing was lacking.

In *U.S. v. SCRAP,* 412 U.S. 669, 93 S.Ct. 2405, 2417 n. 14, 37 L.Ed.2d 254, the Supreme Court held that:

> "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, *see Baker v. Carr,* 369 U.S. 186 [82 S.Ct. 691, 7 L.Ed.2d 663]; a $5 fine and costs, *see McGowan v. Maryland,* 366 U.S. 420 [81 S.Ct. 1101, 6 L.Ed.2d 393]; and a $1.50 poll tax, *Harper v. Virginia Bd. of Elections,* 383 U.S. 663 [86 S.Ct. 1079, 16 L.Ed.2d 169]. While these cases were not dealing specifically with § 10 of the APA, we see no reason to adopt a more restrictive

> interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing and the principle supplies the motivation." Davis, STANDING: TAXPAYERS AND OTHERS, 35 U. CHI. L. REV. 601, 613. *See also* K. Davis, ADMINISTRATIVE LAW TREATISE §§ 22.09-5, 22.09-6 (Supp.1970).

Thus, in *SCRAP,* the Supreme Court seemed to equate "injury in fact" with "aggrieved" or "adversely affected."

[1] The Court has recently refined its position, declaring in *Valley Forge v. Americans United,*——U.S.——,102 S.Ct. 752, 70 L.Ed.2d 700 (1982):

> Respondents also claim standing by reference to the Administrative Procedure Act, 5 U.S.C. § 702 (1976), which authorizes judicial review at the instance of any person who has been "adversely affected or aggrieved by agency action within the meaning of a relevant statute." Neither the (APA), nor any other congressional enactment, can lower the threshold requirements of standing under Art. III. *See, e.g., Gladstone, Realtors v. Village of Bellwood,* 441 U.S. [91] at 100 [99 S.Ct. 1601 at 1608, 60 L.Ed.2d 66]; *Warth v. Seldin,* 422 U.S. [490] at 501 [95 S.Ct. 2197 at 2206, 45 L.Ed.2d 343]. Respondents do not allege that the Act creates a legal right, "the invasion of which creates standing," *Linda R.S. v. Richard D.,* 410 U.S. [614] at 617 n. 3 [93 S.Ct. 1146 at 1148 n. 3, 35 L.Ed.2d 536] and there is no other basis for arguing that its existence alters the rules of standing otherwise applicable to this case.

It is clear that "Congress may enact statutes which create legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S., supra.*

[2] Regardless of the language used, the true test of standing is whether the parties seeking to invoke the court's jurisdiction have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens

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the presentation of issues upon which the court so largely depends for illumination of difficult questions.

In *Pullman v. Chorney, supra,* the court was faced with a challenge to allegedly fraudulently submitted multiple applications for oil or gas leases, which illegally reduced the probability that the plaintiff's application would be drawn. The court had little problem in concluding that plaintiff met the requirement of "injury in fact";

> Although the plaintiff asserts his claim in various terms, the basic interest to which he claims actual injury is the right to have the drawing for leases under the SOG system be conducted fairly. *Clearly, by alleging that the private defendants fraudulently submitted multiple applications, which illegally reduced the probability that the plaintiff's application would be drawn, the plaintiff has in a sense alleged that the interest he asserts has suffered actual injury,* (emphasis added)

Id. at 166.

Standing was denied because there was no causal relationship between the injury and the court's power to remedy it.

> Even assuming that the plaintiff has alleged a "distinct and palpable injury," however, this Court cannot perceive that the plaintiff has established the requisite connection between the claimed injury and the challenged conduct, or, as that requirement has also been stated, "that the exercise of the Court's remedial powers would redress the claimed injuries."

[3] Arkla's asserted right is the right to bid competitively on KGS tracts of land which the Secretary has reasonably classified and offered. Correlatively, they assert the rights to have the lands not classified arbitrarily, to have the Secretary utilize his discretion properly, and the right to bid for all properly categorized and offered KGS lands for potential profit

and exploratory public benefit. Further, Arkla seeks correction of an alleged situation whereby they were practically defrauded by the Bureau of Land Management into believing that the Fort Chaffee lands were not available for lease. The leases were shortly thereafter leased to TXO, despite Arkla's long-standing avid interest in the lands and continual contact with the Bureau. Additionally, not only does Arkla contend that their efforts to acquire the land were irrationally refused, but that the Secretary acted in excess of his authority by violating the Department of Energy Organization Act, 42 U.S.C. § 7152, in failing to notify the Secretary of Energy at least thirty days prior to the issuance of gas leases, in order to enable him to exercise his responsibilities to promote competition for the leases.

We think the evidence submitted shows a substantial likelihood exists that Arkla has been harmed by the procedures employed herein.

In *Bryant v. Yellen*, 447 U.S. 352, 100 S.Ct. 2232, 65 L.Ed.2d 184 (1980), the Supreme Court held that residents of California's Imperial Valley had standing to intervene on appeal from an order that ruled against the government in an action to declare that irrigation water could not be used for landholdings in excess of 160 acres. The fact that the intervenors could not establish with certainty that they would be able to purchase excess lands if their position prevailed did not defeat standing since purchasers of the land would stand to reap substantial windfall profits on resale. This ruling seems to rest on the potential and likely benefit from a favorable decision, with no more than a very attenuated notion of injury in fact from the practices challenged.

If an "identifiably trifling" interest in economic, aesthetic, conservational and recreational benefits which is substantially likely to be "injured" is sufficient, *see, e.g., Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972),

and *SCRAP, supra,* then hypertechnical constructions couched in eloquent phraseology should not be allowed to effectively defeat a remedy when a wrong is apparent.

[4] Thus, while this Court recognizes the ingenuity of the arguments advanced by TXO and the government on this issue, the

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simple fact is that this Court will not lightly deny standing when (1) there is a causal connection between the claimed injury and the challenged conduct; (2) a substantial likelihood exists that the relief requested may redress the injury suffered; and (3) there is such a palpable injury present that millions of dollars may be affected by the actions complained of. Under these circumstances the Court would feel remiss in its duties in proclaiming that the situation herein presented is abstract and hypothetical. Very rarely will there be a more concrete, adverse litigation "upon which the Court depends for resolution of complicated issues."

[5] The interest of the State of Arkansas in this matter is, or should be, obvious. Pursuant to 30 U.S.C. §§ 191, 355, the State of Arkansas will receive *fifty per cent* (50%) of all money received from sales, bonuses, royalties, and rentals of the public lands involved in this litigation. Clearly, if the Fort Chaffee tracts are irrationally classified as non-KGS areas, the State will lose one-half of all the money which would have been received from the rental of these lands, which, instead, will accrue to the benefit of whichever oil corporation is involved. Conversely, if the tracts are KGS lands, the State of Arkansas stands to gain tens of millions of dollars from a correct and adequate classification procedure in accordance with law. This being so, in view of the foregoing, we have no rational choice except to find that the State of Arkansas has met the standing requirements in this case.

While this Court has not the power to compel the Secretary to offer the lands on a competitive basis, this Court may void the present leases and require the Secretary to make a decision which is well-reasoned and in accordance with law. Since it appears that the policies behind the Mineral Leasing Act and its amendments, the Department of Energy Organization Act, and the history and policy of the Department of the Interior, clearly favor the issuance of the leases competitively where exploration interest is already present, we find that there is a substantial likelihood that the correct resolution of this litigation will afford the parties the relief sought.

B. *Availability of a Cause of Action*

[6] Having concluded that the State of Arkansas and Arkla have standing to challenge the agency action involved, the Court will discuss the necessity and availability of a cause of action applicable to both plaintiffs.

It has been held, repeatedly, that District Courts have jurisdiction to review final agency action of the Department of the Interior, whether under 5 U.S.C. §§ 702, 704, or 28 U.S.C. § 1331. *See generally Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1958); *Coleman v. U.S.,* 363 F.2d 190 (9th Cir. 1966); *Moseley v. Hickel,* 442 F.2d 1030 (9th Cir. 1971); *Roberts v. Morton,* 389 F.Supp. 87, *aff'd,* 549 F.2d 158 (10th Cir. 1977); *Shell Oil Co. v. Kleppe,* 426 F.Supp. 894 (D.Colo.1977); *Andrus v. Charlestone Stone Products Co.,* 436 U.S. 604, 98 S.Ct. 2002, 56 L.Ed.2d 570.

Arkla, beyond doubt, qualifies as an aggrieved party adversely affected by the agency action challenged herein. Further, even if such were not the case, 30 U.S.C. § 22ɔ-2, the statute of limitations provision, clearly implies that judicial review is to be allowed. And finally, 30 U.S.C. §§ 191, 355 seem to allow for such an implied right of action by any person affected by the funding schemes.

30 U.S.C. § 191 provides:

> All money received from sales, bonuses, royalties, and rentals of the public lands . . . shall be paid into the Treasury of the United States; *50 per centum* thereof shall be paid by the Secretary of the Treasury . . . to the State . . . to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted by development of minerals leased under this Act, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service: . . .

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Considering the four factors listed in *Cort v. Ash,* 422 U.S. 66, at 78, 95 S.Ct. 2080, at 2087-88, 45 L.Ed.2d 26, in relation to the entire statutory scheme presented here, it is clear that a cause of action is available to enforce the payments due. This implies that the State may attack allegedly capricious determinations by the agency which affect the State's payments greatly, because, when considered as a whole, it is clear that the right asserted is within the zone of interests regulated by the entire legislation.

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. *First,* is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33, 39 [36 S.Ct. 482, 484, 60 L.Ed. 874] (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? *Second,* is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? *See, e.g., National Railroad Passenger Corp. v. National Assn. of Railroad Passengers,* 414 U.S. 453, 458, 460 [94 S.Ct. 690, 693, 694, 38 L.Ed.2d 646] (1974) (*Amtrak*). *Third,* is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? *See, e.g., Amtrak, supra; Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 423 [95 S.Ct. 1733, 1740, 44 L.Ed.2d 263] (1975); *Calhoon v. Harvey,* 379 U.S. 134 [85 S.Ct. 292, 13 L.Ed.2d 190] (1964). And *finally,* is the

> cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? *See Wheeldin v. Wheeler,* 373 U.S. 647, 652 [83 S.Ct. 1441, 1445, 10 L.Ed.2d 605] (1963); *cf. J. I. Case Co. v. Borak,* 377 U.S. 426, 434 [84 S.Ct. 1555, 1560, 12 L.Ed.2d 423] (1964); *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 394-395 [91 S.Ct. 1999, 2003-04, 29 L.Ed.2d 619]; *id.* at 400 [91 S.Ct. at 2006] (Harlan, J., concurring in judgment).

Cort v. Ash, supra.

Accordingly, the Court concludes that the instant action is cognizable in the District Courts of the United States.

In short, Arkla may be heard in this matter as a matter of administrative law of general applicability, and the State may do so to protect its rights granted by federal law.

C. *Collateral Estoppel*

[7] Both TXO and the government argue that Arkla is collaterally estopped from litigating the issues presented because the validity of the leases issued noncompetitively to TXO was litigated in the District Court for the District of Columbia and an appeal in the Court of Appeals for the District of Columbia Circuit (*see Texas Oil and Gas Corp. v. Watt,* 683 F.2d 427 (D.C. Cir.1982); *Texas Oil and Gas Corp. v. Andrus,* 498 F.Supp. 668 (D.D.C.1980).

Arkla was involved in that litigation, but as *amicus curiae,* their motion for intervention having been denied.

In *Oldham v. Pritchett,* 599 F.2d 274, 278-279 (8th Cir. 1979), the Eighth Circuit Court of Appeals discussed the four-pronged test for the applicability of the doctrine of collateral estoppel, earlier approved in *Gerrard v. Larsen,* 517 F.2d 1127 (8th Cir. 1975). Said the Court:

As a branch of the doctrine of res judicata, collateral estoppel serves both judicial and private interests in the termination of litigation. In the context of the judicial system, collateral estoppel principles serve primarily to conserve time and resources; at the same time, the application of collateral estoppel is a means by which a litigant may evade unnecessary expenses and potential harassment by lawsuit, and avoid conflicting rights and duties arising from inconsistent judgments. *Johnson v. United States,* 576 F.2d 606, 609- 10 (5th Cir. 1978); *Southwest Airlines Co. v. Texas International Airlines,* 546 F.2d 84, 94 (5th Cir. 1977); *Bruszewski v. United States,* 181 F.2d

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419, 421 (3d Cir. 1950), *cert. denied,* 340 U.S. 865, 71 S.Ct. 87, 95 L.Ed. 632 (1950).

Traditionally, courts have required "mutuality" between parties as a condition to the application of collateral estoppel. 1B Moore's Federal Practice ¶ 0.412[1] at 1803–04. The doctrine of "mutuality" requires that "the party invoking the judgment must similarly be bound to it either as *party* or as a *privy.*" 1B Moore's Federal Practice ¶ 0.441[3] at 3781. The more recent trend, however, has been to eliminate strict "mutuality" as a condition to the application of collateral estoppel. *Montana v. United States,* [440] U.S. [147], 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979); *Cramer v. General Tel. & Electronics Corp.,* 582 F.2d 259, 267–68 (3d Cir. 1978); *Johnson v. United States,* 576 F.2d 606, 614 (5th Cir. 1978); *Speaker Sortation Systems, Division of A–T–O, Inc. v. United States Postal Service,* 568 F.2d 46, 48–49 (7th Cir. 1978); *accord, Griffin v. Burns,* 570 F.2d 1065, 1072 (1st Cir. 1978); *Windham v. American Brands, Inc.,* 565 F.2d 59, 69 n. 30 (4th Cir. 1977); *Clark v. Watchie,* 513 F.2d 994, 998 n. 6 (9th Cir. 1975); *see Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 324-327, 91 S.Ct. 1434 [1440–1442], 28 L.Ed.2d 788 (1970); Restatement (Second) Judgments, Appendix § 88, Comment b at 162-63 (Tent. Draft No. 3, 1976); *see also* Currie, *Mutuality of Collateral Estoppel; Limits of the Bernhard Doctrine,* 9 Stan.L.Rev. 981 (1957). This shift toward a more

functional approach to the application of collateral estoppel has similarly resulted in the demise of the companion rule to "mutuality," the requirement of strict "adversity" between parties. *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 at 845 (3rd Cir.) 1B Moore's Federal Practice, ¶ 0.411[2] at 1314. Since Justice Traynor's seminal opinion in *Bernhard v. Bank of America Nat. Trust & Savings Assn.*, 19 Cal.2d 807, 122 P.2d 892 (1942), many jurisdictions permit nonparties to prior actions to rely on the judgment as a defense to a subsequent action brought by a party to the prior litigation. *See Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1970); Note, *Collateral Estoppel of Non-Parties*, 87 Harv.L.Rev. 1485 (1974). If a stranger to the prior litigation may invoke estoppel as a defense, then *a fortiori* a co-party in the prior action ought to be able to preclude a former co-party from relitigating issues finally adjudicated in the prior lawsuit, *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d at 845.

In *Gerrard v. Larsen*, 517 F.2d 1127, 1131-32 (8th Cir. 1975), this Court recognized the general erosion of strict "mutuality" between parties as a requisite to the application of collateral estoppel in its defensive context. *See Garrigan v. Giese*, 553 F.2d 35, 36-37 n. 2 (8th Cir.). The *Gerrard* court, in discussing whether federal or state law should be applied in determining the collateral estoppel effect of an issue adjudicated in a prior diversity action, found it unnecessary to resolve the issue because the defensive assertion of collateral estoppel could have been accomplished under either body of law. *Id.* at 1132. The *Gerrard* court proceeded on the basis that estoppel was appropriate where: (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. *Gerrard. v. Larsen*, 517 F.2d at 1130; see *Parklane Hosiery Co. v Shore*, [439 U.S. 322] 99 S.Ct. [645] at 652 [58 L.Ed. 2d 552]; *Blonder-Tongue Laboratories, Inc. v. University of Illinois Founda-*

> *tion,* 402 U.S. at 328, 91 S.Ct. 1434 [at 1442]. We believe that this analysis may appropriately be applied to the circumstances of the present case. The Court's adoption of the *Gerrard* four-part test for the application of collateral estoppel additionally forecloses the issue of whether the Oldhams and Pritchett were "adverse" as co-parties in the proceeding.
>
> [548 F.Supp. 475]
>
> We agree with the reasoning of the Third Circuit that "[the] nullification of the mutuality requirement renders non-adversity irrelevant to the doctrine of collateral estoppel." *Scooper Dooper, Inc. v. Kraftco Corp.,* 494 F.2d at 845.

TXO argues that, inasmuch as all of the counts contained in Arkla's complaint relate to the general issue of the legal validity of the Secretary's decision to issue the leases, and since that question has been decided by the District of Columbia Court of Appeals, Arkla should not be able to relitigate the question.

However, the Court of Appeals for the District of Columbia Circuit held only that the Secretary's own regulations did not require him to cancel the leases. The Secretary had argued that under 43 C.F.R. § 2091.1, the public land laws came into effect only when he exercised his discretion whether to allow leasing of certain lands. 43 C.F.R. § 2091.1 requires the rejection of applications for leases if "for any reason the land has not been made subject, or restored, to the operation of the public land laws." Under then-existing regulations, his discretion to lease the lands required prior published notice in the Federal Register. The District of Columbia Court of Appeals concluded that 30 U.S.C. § 352 (1976) (The Coal Leasing Amendments Act of 1975) made the Fort Chaffee lands immediately subject to the "operation of the public land laws" without the necessity of regulations implementing the new legislation and without any announcement or notice as was theretofore required.

Clearly, as Arkla was neither a party to the prior litigation nor in "privity" with a party, and inasmuch as Arkla raises new issues not litigated in the previous proceedings, the *Gerrard* test forbids the application of the doctrine of collateral estoppel in the instant action. Accordingly, Arkla's claims are not barred.

D. *Exhaustion of Administrative Remedies*

[8] As noted, Arkla filed a "protest" of the Secretary's issuance of these leases on September 17, 1979. On September 20, 1979, the Secretary directed the U.S. Geological Survey to re-evaluate its classification of the leased land. On November 1, 1979, the Secretary cancelled the twenty leases and declared a moratorium on the leasing of all acquired military lands.

43 C.F.R. § 4.21 sets forth General Rules Relating to Procedures and Practice in the administrative bodies:

> (a) *Effect of decision pending appeal.* Except as otherwise provided by law or other pertinent regulation, a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. However, when the public interest requires, the Director or an Appeals Board may provide that a decision or any part of it shall be in full force and effect immediately.
>
> (b) *Exhaustion of administrative remedies.* No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. § 704, unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section.

We think it clear that, as the Secretary reversed his issuance of the leases to TXO and Arkla's appeal was subse-

quently dismissed as "moot," Arkla has timely and diligently pursued whatever administrative remedies that were available.

Since the Secretary is now subject to the direction of the District of Columbia Court of Appeals to reinstate TXO's leases, it is clear that any further administrative appeal would be futile, as the Secretary presently has no real choice as to which course to follow. It is well-settled that exhaustion is not required when to require exhaustion would be futile. *U.S. ex rel. Marrero v. Warden*, 483 F.2d 656 (3rd Cir. 1974), *rev'd on other grounds*, 417 U.S. 653, 94 S.Ct. 2532, 41 L.Ed.2d 383; *Wolff v. Selective*

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Service Local Board # 16, 372 F.2d 817 (2nd Cir. 1967).

In *United States v. Newmann*, 478 F.2d 829 (8th Cir. 1973), the Eighth Circuit utilized a balancing test

> which weighed the interests of the (plaintiff) against three specified governmental interests in requiring exhaustion . . . (a) the agency's interest in having an opportunity to make a factual record and exercise its discretion and expertise without the threat of litigious interruption; (b) the agency's interest in discouraging frequent and deliberate flouting of the administrative process; and (c) the agency's interest in correcting its own mistakes and thereby obviating unnecessary judicial proceedings.

Id. at 831.

No interests on anyone's behalf would be served by requiring Arkla and the State of Arkansas to further pursue administrative remedies. Accordingly, as Arkla has in fact avidly pursued administrative remedies when required and available, and as further administrative proceedings would be futile and of no benefit to anyone, we conclude that the exhaustion doctrine does not preclude the present action.

E. *Statute of Limitations*

[9] Both the government and TXO argue that Arkla's present action is not timely.

30 U.S.C. § 226-2 provides:

> No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secretary relating to such matter.

As noted, under 43 C.F.R. § 4.21, Arkla was no longer "adversely affected" once the Secretary reversed his issuance of the leases. Not only did Arkla not have to further pursue administrative proceedings, it could not, *i.e.*, its case was "moot."

Additionally, 30 C.F.R. § 290.7 provides:

> Any party to a case adversely affected by a final decision of the Director, Geological Survey, or the Commissioner of Indian Affairs under this part shall have a right of appeal to the Board of Land Appeals.

Thus, it is clear that Arkla was not "adversely affected" by a "final decision" until the Secretary's issuance of the leases was ordered reinstated, at the earliest.

Any other construction of the applicable law would have the effect of allowing the Secretary to "stay" any adverse decisions until the statute of limitations expired, precluding any challenge altogether. This is plainly not the intent of Congress. Accordingly, we conclude that Arkla's action is timely, and that no further administrative proceedings are required.

F. *Intervention*

Several parties, the State of Arkansas, Greenwood School District No. 25, Lavaca School District No. 3, Charleston

School District No. 9, and the Fort Smith Special School District, have sought leave to intervene in this matter.

Rule 24, Fed.R.Civ.P., provides:

> (a) Upon timely application anyone shall be permitted to intervene in an action: . . .
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The State of Arkansas, for various reasons not important here, asserts claims of title to some of the lands in question, as well as to the oil and gas rights to those lands. Clearly, they have properly met the requirements of Rule 24(a) governing intervention of right. Although the trial of this cause will be bifurcated so as to allow the expeditious presentation and adjudication of the injunctive relief sought, the State of Arkansas is properly in this lawsuit. The government does not oppose the intervention of the State of Arkansas.

Rule 24(b) governs permissive intervention. It provides:

> (b) Upon timely application anyone may be permitted to intervene in an action: . . .
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unusually delay or prejudice the adjudication of the rights of the original parties.

Although Arkla seeks to enforce its right to bid for offered KGS lands for potential profit, the State seeks to enforce the public interest. Thus, whether by virtue of Rule 24(a) or (b), this Court feels that inasmuch as the same issues of fact and law are involved in the State's claims as in Arkla's and since the intervention by the State will not significantly delay or prejudice

the rights of the original parties, the motion to intervene of the State of Arkansas should be granted. We foresee no appreciable degree of prejudice to TXO, the only party opposing the State's intervention.

[10] As for the school districts, however, it is beyond question that any intervention would be permissive, under Rule 24(b). As their asserted claims are practically identical to those of the State and derivative of those of the State, the Court finds that the addition of further parties to this action would delay and complicate the prompt adjudications of the parties' respective interests and would add very little to this Court's efforts to achieve the correct resolution of the issues presented. The school districts' interests are adequately protected by the State of Arkansas and Arkla.

Thus, we conclude that the motions of the school districts to intervene should be denied.

G. *Scope of Review*

[11] TXO and the government contend that any review by this Court would necessarily be confined to the administrative record. This is, of course, the general rule.

In *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973), the Supreme Court said, at p. 141, 93 S.Ct. at p. 1243-44:

> It is quite plain from our decision in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 [91 S.Ct. 814, 28 L.Ed.2d 136] (1971), that *de novo* review is appropriate only where there are inadequate fact-finding procedures in an adjudicatory proceeding, or where judicial proceedings are brought to enforce certain administrative actions.

TXO argues that this exception is not applicable because the proceedings employed by the Secretary require no adjudica-

tory hearing in fixing the boundaries of a KGS. That no adjudicatory proceedings are at issue is the crux of TXO's argument.

In response, Arkla and the State assert that even though no "hearing" *per se* was granted or required, this gives rise to no inference that the procedures were not adjudicatory in nature. 5 U.S.C. § 554(a)(3) exempts "adjudications" involving proceedings in which decisions which rest solely on "inspections, tests, or elections" from the ordinary hearing requirements, even though adjudicatory in nature. Arkla and the State argue that the KGS classification is an informal adjudicatory proceeding based solely on inspections or tests, as applied to applicants for leases.

"Adjudication" is the agency process for the formulation of an "order." 5 U.S.C § 551(7). "Order" is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than 'rulemaking,' but including licensing." 5 U.S.C. § 551(6).

"Rulemaking" is the agency process for formulating, amending or repealing a "rule." 5 U.S.C. § 551(5). "Rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy, or describing the organization, approval or prescription for the future of rates, wages, corporate or financial structures or organizations thereof, prices, facilities, appliances, services or allowances therefore, or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

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Courts have had trouble interpreting this bureaucratic "gobbledegook" and have instead used the English language equivalent:

> Where a federal administrative agency makes law as a legislature would, it is rulemaking under the APA. When it makes law as a court would, it is adjudicatory in nature.

N.L.R.B. v. A.P.W. Products Co., 316 F.2d 899 (2nd Cir. 1963).

> . . . adjudicative facts, which are those that immediately affect only specific litigants, must be resolved on the basis of evidentiary submissions . . . .

Patagonia Corp. v. Bd. of Governors of Federal Reserve System, 517 F.2d 803 (9th Cir. 1975).

The cases which have addressed the review of decisions of the Secretary of the Interior with respect to mining and mineral claims have applied the general rule and held that review is limited to the administrative record, *Multiple Use, Inc. v. Morton*, 504 F.2d 448 (9th Cir. 1974); *Doria Mining & Engineering Corp. v. Morton*, 420 F.Supp. 837 (C.D.Cal.1976); *Roberts v. Morton*, 389 F.Supp. 87 (D.Colo.1975); *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963); *Coleman v. United States*, 363 F.2d 190 (9th Cir. 1966); *Denison v. Udall*, 248 F.Supp. 942 (D.Ariz.1965); *Foster v. Jensen*, 296 F.Supp. 1348 (C.D.Cal.1966), although the Secretary is frequently reversed.

This Court has no desire to substitute its judgment for that of the Department of the Interior, however attractive that objective may be made to appear. However, the Court would be wholly unable to apply the "arbitrariness" test without sufficient information as to the technical expertise involved. Thus, for example in *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F.Supp. 457 (D.Kan.1978), *aff'd*, 602 F.2d 929 (10th Cir. 1979), the district court permitted the parties to introduce outside "explanatory" evidence for this purpose, even though the case was not tried *de novo*. "The court, in reviewing the action, must determine whether all relevant factors were considered." *Id.* at 467. *See Independent Meat Packers Assn. v. Butz*, 526 F.2d 228, 238 (8th Cir. 1975). As the Court said in *Hiatt*:

> How is the Court to determine whether all relevant factors were considered in the administrative record without knowing what factors outside the administrative record were not considered in the decision making process.

Hiatt, supra, at p. 467.

In *Hiatt,* the Court allowed evidence to be submitted for the following purposes: (1) to assist the Court to understand the complex issues presented; (2) allowing the Court to determine the adequacy of the administrative record; (3) for explanation of the administrative record.

In *Bunker Hill Co. v. Environmental Protection Agency,* 572 F.2d 1286 (9th Cir. 1977), the Eighth Circuit said:

> . . . the Courts are not straightjacketed to the original record in trying to make sense of complex technical testimony, which is often presented in administrative proceedings without ultimate review by nonexpert judges in mind. Here, the augmenting materials were merely explanatory of the original record.

Id. at 1292.

And finally, it goes without saying that this Court must at least be able to ascertain the scope of the administrative record considered and the procedures employed, so that we will have a record to review.

Accordingly, we will base our decision on the administrative record and the cause will not be tried *de novo,* however, supplementary materials will be received to show the adequacy or inadequacy of the facts considered by the Secretary, to supply the Court with sufficient technical expertise to aid the Court in understanding the complex issues involved, and to show the true scope of the record and procedures employed by the Secretary in reaching his decision.

A separate order in accordance with this memorandum opinion will be concurrently entered.

EXHIBIT 5

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ARKLA EXPLORATION COMPANY and State of Arkansas, Plaintiffs,

v.

James G. WATT, Secretary of the United States Department of the Interior, and Texas Oil and Gas Corp., Defendants.

Civ. No. 82-2168.

United States District Court,
W.D. Arkansas,
Fort Smith Division
April 19, 1983

Gas exploration company brought action against the Secretary of the Interior and lessee of certain oil and gas leases challenging validity of the leases. The District Court, H. Franklin Waters, Chief Judge, held that clear listing procedure under which the lands were found not to have been within a "known geological structure" and thus exempt from competitive bidding was arbitrary, rendering the leases invalid.

Judgement for plaintiff.

Mines and Minerals 5.1(1)

Clear listing procedure utilized in determining that oil and gas lands on military reservation were not within a "known geological structure" and thus exempt from competitive bidding under the Mineral Lands Leasing Act was arbitrary because it was not based upon clearly defined relevant factors for making such a determination in that it ignored previous statutory unavailability of any meaningful industry testing, exploration or development, rendering invalid certain uncompetitive oil and

gas leases of the lands. Mineral Lands Leasing Act, § 17, as amended, 30 U.S.C.A. § 226.

Jim Guy Tucker, Mitchell, Williams & Selig, Little Rock, Ark., Alan S. Novins, Lee Ellen Helfrich, Lobel, Novins & Lamont, Washington, D.C., Robert Roberts, III, Blanchard, Walker, O'Quin & Roberts, Shreveport, La., for plaintiff, Arkla Exploration Co.

Steve Clark, Atty. Gen., and Roger W. Giles, Asst. Attys. Gen., Little Rock, Ark., for plaintiff-intervenor, State of Ark.

W. Asa Hutchinson, U.S. Atty., Fort Smith, Ark., Andrew F. Walch, Patricia J. Beneke, Land and Natural Resouces Div., Mark K. Seifert, Energy and Resources Div., Office of the Solicitor, Dept. of the Interior, Washington, D.C., for defendant, James G. Watt.

Bradley D. Jesson, Robert T. Dawson, Hardin, Jesson & Dawson, Fort Smith, Ark., Craig R. Carver, Gibson, Dunn & Crutcher, Denver, Colo., for defendant, Texas Oil and Gas Corp.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

H. FRANKLIN WATERS, Chief Judge.

Introduction

The historical background and factual summary of this action is set forth in the Court's Memorandum Opinion of September 20, 1982, ruling on certain preliminary motions. *Arkla Exploration Co. v. Watt*, 548 F.Supp. 466 (W.D.Ark.1982), at 468-469. For purposes of brevity, the same will not be reiterated herein.

Hearing on motion for preliminary injunction and trial on the merits was held in Fort Smith from September 27, 1982,

through September 30, 1982. At the close of the trial, the Court entered a preliminary injunction restraining the Secretary of the Interior from reinstating certain leases issued noncompetitively to Texas Oil and Gas Corp. (TXO), and restraining TXO from further drilling activities on the lands in question. At the conclusion of the trial, the Court directed the parties to submit simultaneous briefs and proposed findings and conclusions.

Ten witnesses were produced at trial. For the plaintiffs were:

1. W.E. "Bill" Wright—Director, Arkansas Oil & Gas Commission;

2. Boyd Haley—Geologist, U.S. Geological Survey;

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3. Norman F. Williams, Sr.—State Geologist, State of Arkansas;

4. Cliff C. Burgess—Vice President, Land Department, Arkla Exploration Company;

5. James C. Black—Vice President, Geological and Geophysical Department, Arkla Exploration Company;

6. Charles S. Bartlett, Jr.—Consulting Geologist;

7. Emmett A. Finley—Former Chief, Branch of Mineral Classification, U.S. Geological Survey.

Testifying for defendants were:

1. Doy Zachry—Associate Professor, Department of Geology, University of Arkansas;

2. Gary Horton—Acting Chief, Division of On-Shore Resource Evaluation, Mineral Management Service;

3. Dale Zimmerman—Assistant to the Deputy Director for Energy and Mineral Resources, Bureau of Land Management.

The Court accepted three deposition transcripts, subject to later ruling on objections to portions of the transcripts. These were the depositions (Tr. 181-187)of:

1. Joseph R. Binford—Senior Attorney, TXO;

2. Jeff O. Holdren—Chief, Division of Lands and Minerals Operations, Eastern States Office, Bureau of Land Management;

3. Edward L. Johnson—former Area Geologist, Tulsa, U.S. Geological Survey.

From the evidence adduced at trial, the Court hereby enters the following findings of fact and conclusions of law.

Findings of Fact

1. Fort Chaffee Military Reservation, within which the lands in question are located, lies primarily in the northeast corner of Sebastian County, although portions of both the Fort and the lands extend into western Franklin County (Ex. 26), Arkansas.

2. Geologically, the Fort is within what is known as the Arkoma Basin, which extends from west Texas through Oklahoma to east Arkansas.

3. The Fort lies north of the Ouachita Mountains which are composed of many highly deformed sedimentary rocks (Zachry, Tr 547), and south of the Ozark Plateau. (Zachry, Tr. 548)

4. The "lands in question" are those sought to be leased by TXO, and comprise 33,510.4 acres within Fort Chaffee. (Ad. Rec. 15-34)

5. In 1920, Congress enacted the Mineral Leasing Act, 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*, giving the Secretary discretionary authority to open public domain lands to mineral exploration and development.

6. From 1920 to 1947, the authority of the Secretary of the Interior to lease mineral rights on federal lands was limited under the Mineral Leasing Act to "public domain land," that is, land claimed by the United States as part of its national sovereignty. 41 Stat. 437, as amended, 30 U.S.C. 181 *et seq.*

7. In 1947, Congress authorized leasing on "acquired lands," lands acquired by the Federal Government from private owners for public purposes. Mineral Leasing Act for Acquired Lands, 61 Stat. 913, 30 U.S.C. 351 *et seq.* Fort Chaffee fits within this category. However, that Act specifically excluded military lands from leasing.

8. In 1976, Congress amended the Mineral Leasing Act for Acquired Lands and removed the military lands exclusion, thereby opening up such lands for leasing. Federal Coal Leasing Amendments Act of 1975, § 12, Pub.L. No. 94-377, 90 Stat. 1083 (Tr. 766).

9. Under the Mineral Leasing Act of 1920, oil and gas leasing is divided into two categories: competitive and noncompetitive. That Act provides that only lands within a "known geological structure of a producing oil and gas field" may be leased to the highest qualified competitive bidder, 30 U.S.C. 226(b). Otherwise, lands not

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within a "known geological structure" (KGS), if leased at all, may be leased only to the first qualified applicant on a noncompetitive basis. 30 U.S.C. 226(c). (Tr. 761)

10. In May, 1977, some nine months after enactment of the Federal Coal Leasing Amendments Act of 1975, Texas Oil and Gas Corp. (TXO) filed applications for 38 non-competitive oil and gas leases covering 78,000 acres on Fort Chaffee.

11. Neither Arkla nor the Secretary of the Interior was aware that the Federal Coal Leasing Amendments Act of 1975 had the effect of opening Fort Chaffee to mineral leasing without the necessity of notice published in the Federal Register. This issue of first impression was decided in *TXO v. Watt*, 683 F.2d 427 (D.C.Cir.1982).

12. In September, 1977, the Department of the Interior published draft regulations implementing the changes brought

about by the Federal Coal Leasing Amendments Act of 1975. 42 Fed.Reg. 46,558-46,559 (Sept. 16, 1977). These regulations became effective in September, 1978. 43 Fed.Reg. 37,202.

13. Eighteen of TXO's applications covering 45,000 acres were either rejected or withdrawn by the company because either (1) the Army would not permit leasing, (2) the United States did not hold the mineral rights in the area, or (3) the areas were within a known geologic structure (KGS), making them available only for competitive leasing.

14. Twenty of TXO's offers to lease lands at Fort Chaffee were accepted by the Bureau of Land Management (BLM) and leases were issued effective July 1, 1979, covering approximately 33,000 acres. The total lease payments received were $33,000.00.

15. Arkla filed a protest on September 17, 1979, with the Eastern States Office, BLM, against the issuance of the TXO leases (Arkla Amended Complaint, p. 2).

16. The Secretary of the Interior concluded that the Fort Chaffee leases, having been issued on application submitted prior to the effective date of the new regulations implementing changes brought about by the Federal Coal Leasing Amendments Act of 1975 should not have been issued. On November 1, 1979, he issued a decision cancelling the leases and rejecting all pending applications for leases on military lands which had been filed prior to September 21, 1978, the effective date of the new regulations. *See, e.g.*, Ad.Rec. 15. TXO sued to have the leases reinstated.

17. The district court upheld the Secretary's action. *Texas Oil & Gas Corp. v. Andrus*, 498 F.Supp. 668 (D.D.C.1980).

18. The administrative protest filed by Arkla was dismissed as moot on January 3, 1980, and no appeal to the interior Board of Land Appeals was taken.

19. On August 4, 1983, plaintiff Arkla filed its complaint, seeking an order directing the Secretary of the Interior not to

issue twenty (20) oil and gas leases to TXO on Fort Chaffee, Arkansas.

20. Plaintiff Arkla's complaint raises the following claims: (1) that the Department of the Interior (DOI) was arbitrary and capricious in promulgating the current definition of a "known geological structure of a producing oil or gas field" (KGS) found at 43 C.F.R. 3100.0-5(a); (2) that the KGS determination made in this instance was arbitrary and capricious; (3) that defendant violated the Administrative Procedure Act (APA) in not publishing a notice in the Federal Register that the Fort Chaffee lands were available for leasing; (4) that defendant violated plaintiff's due process rights; and (5) that defendant violated Sections 302(b) and 303(c)(1) of the Department of Energy Organization Act, 42 U.S.C. §§ 7152(b), 7153(c) (Pub.L. No. 95-91, August 4, 1977).

21. Plaintiff Arkla sought a temporary restraining order, which was granted by order of August 5, 1982.

22. In addition to opposing plaintiff's motion for preliminary injunction, both the federal defendant and TXO filed motions to dismiss. Federal defendant raised several bases for dismissal, including that: (1)

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plaintiff lacks standing to pursue its action; (2) this Court lacks subject matter jurisdiction over the action; (3) Congress did not create a private cause of action under the Mineral Leasing Act of 1920; (4) the action is barred by the ninety-day statute of limitations in the Mineral Leasing Act of 1920; (5) Arkla failed to avail itself of administrative remedies and hence is barred from pursuing its action here; (6) the action is barred by collateral estoppel; and (7) Arkla's claims are without merit. In the alternative, defendants moved for a change of venue to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a).

23. Defendants' motions for a change of venue were denied by the Court from the bench.

24. By order of September 20, 1982, the Court denied defendants' motions to dismiss. The order was accompanied by a memorandum opinion. *Arkla Exploration Co. v. Watt,* 548 F.Supp. 466 (W.D. Ark. 1982).

25. The State of Arkansas moved to intervene as a plaintiff. The State raised essentially identical claims to those raised by Arkla, with the addition of one claim pertaining to the title to the mineral rights involved. This claim has been bifurcated from the remaining claims. Several local school districts also moved to intervene. In its September 20, 1982, order, the Court granted the State's motion, while denying those of the school districts.

26. Defendants filed motions to limit review in this case to the administrative record filed with the Court. Such motions were opposed by plaintiff. The Court granted defendants' motions to limit review to the administrative record with certain exceptions delineated in *Arkla Exploration Co. v. Watt, supra,* at 477-78.

27. On September 23, 1982, federal defendant moved for summary judgment in this matter on the basis that the scope of review is properly limited to the administrative record before the Court, there exist no genuine issues of material fact, and federal defendant is entitled to a judgment as a matter of law.

28. On September 27, 1983, the Court denied federal defendant's motion for summary judgment from the bench. (Tr. 3)

29. The Court conducted a consolidated hearing on the preliminary injunction and on the merits from September 27, 1982, through September 30, 1982.

30. At the conclusion of that hearing, the Court entered a preliminary injunction against the issuance of the subject leases by DOI.

31. Plaintiff Arkla is a corporation organized under the laws of the State of Delaware, with its principal place of business in Shreveport, Louisiana. Plaintiff is a wholly-owned subsidiary of the Arkansas Louisiana Gas Company, and is engaged in the business, *inter alia*, of exploring for, developing and producing oil and natural gas.

32. Plaintiff-intervenor is the State of Arkansas, and is represented by the State's Attorney General, Steve Clark.

33. Defendant James G. Watt is the Secretary of the Interior of the United States of America and is sued herein in his official capacity for actions taken by himself, under his responsibility and jurisdiction, and by his predecessor in office in his official capacity.

34. Defendant TXO is a corporation organized under the laws of the State of Delaware with a principal place of business in Dallas, Texas, and does business in the Western District of the State of Arkansas.

35. Plaintiffs have standing to pursue this action. The Court has subject matter jurisdiction. Plaintiffs have exhausted their administrative remedies. Venue is proper in this Court.

36. It is the policy and intent of Congress and the Department of the Interior to stimulate exploration of lands in which current exploratory interest is lacking and to promote competition with respect to lands in which the exploration interest and development is present.

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37. The Fort Chaffee area is located in the Arkoma Basin, which extends from east-southeastern Oklahoma into west-central Arkansas. Ad.Rec. 39. Most of the natural gas in the area is in rocks of Pennsylvania age, known as the Atoka. (Tr. 550) Ad.Rec. 45.

38. Traps from which gas may be produced can be "structural," resulting from the presence of structure such as

anticlines and synclines; "stratigraphic," resulting from configurations of the sediments; or can be "fault traps," resulting from the presence of faults. (Tr. 638-640, 561-565-566)

39. All or substantially all of the lands in question are on the Biswell Hill Anticline, the Washburn Anticline, or the Game Hill Anticline. (Ex. 34; Tr. 377-378)

40. An anticline is a geologic structure consisting of an upward fold in a layer or layers of rock. (Tr. 559)

41. The Fort lies north of the Ouachita Mountains which are composed of many highly deformed sedimentay rocks (Zachry, Tr. 547), and south of the Ozark Plateau. (Zachry, Tr. 548).

42. The general location of the anticlinal and synclinal axes in the area of Fort Chaffee is shown on Plaintiff's Exhibit 34 and Defendant's Exhibit C.

43. Mr. Williams defined the extent of an anticline as being from "the axis of the anticline down to the axis of the syncline" (Tr. 101), or by measuring from syncline to syncline. In the case of Biswell Hill, Mr. Williams stated it would extend from the axis of the Greenwood syncline on the south to the axis of the Central syncline on the north.

44. As Dr. Bartlett and Mr. Finley and Dr. Zachry pointed out, gas, unless blocked by porosity, permeability, fault or leakage will always tend to migrate up structure. (Tr. 357, 462, 562, 597, 826) The fact a producing well is drilled in a syncline may indicate the producing layer may run from and be filled with gas from the syncline to the top of the anticline. (Tr. 834, 835)

45. Since gas will move upwards, if not impeded, whether it begins from the bottom of the syncline or halfway up the anticline, the Court finds that for KGS purposes, the anticlines should be measured from axis of syncline to axis of syncline.

46. The Atoka consists of alternating layers of sandstone and shale. (Tr. 550, 553) Ad.Rec. 44 at 69. There is production from many of the sandstones within the Atoka. Ad.Rec. 41. These sands are lenticular, or lens-shaped. (Tr. 111, 320, 561) They vary in character.

47. The geology of the Fort Chaffee area is complicated by faulting, folds and varied sand deposition. (Tr. 323) Faulting is present throughout the Fort Chaffee area. Ad.Rec. 39, 44, 46. (Tr. 551) Displacement from faults in this area ranges from less than 1,500 feet to 2,500 feet. Ad.Rec. 45 at 1.

48. A fault can divide one trap into two traps, since gas cannot migrate across the fault. (Tr. 115, 125, 305, 391, 428, 565-566)

49. The lands in question were at June 29, 1979, and are virtually surrounded by producing gas wells and there is a very high probability many gas discoveries will be made on those lands. (Report of O. W. Girard, Ad.Rec. 13a, p. 17; Ex. 7)

50. The region of the Fort Chaffee military reservation is characterized by extensive natural gas production. The earliest commercial gas well production in this region was in the early 1930's. (Ex. 26, e.g., Sec. 13, T8N, 29W) The earliest commercial gas well production within the boundaries of the Fort occurred in 1967 in Sec. 23, T8N, 31W. (Ex. 26)

51. Experts on behalf of all parties to this litigation have commented on the very high success ratio for exploration efforts in this region and their opinions of the future probability of production from the lands in question.

52. Dr. Zachry, a witness for TXO, described the success ratio within the Fort as "fairly high" for the Arkoma Basin overall and as "great" for six particular wells within the Fort. (Tr. 602, 614) Mr. Williams

described the success rate in the area as about 50%. (Tr. 126) He observed that his estimates were conservative and that the success ratio to date immediately around the Fort was higher than the success ratio in the Arkoma Basin generally. (Tr. 105) Mr. Horton described the lands as containing a large number of multiple, overlapping, productive zones (Tr. 700), and multiple, overlapping reservoirs. (Tr. 701)

53. Dr. Bartlett described the lands in question as "presumptively productive." (Tr. 394, 439, 429) He observed that a well drilled in the center of the Biswell Hill Anticline would have "going for it the fact that there are within a couple of miles of that location . . . seven different producing sands" and that the "odds are excellent that that well will drill into one or the other of those" sands. (Tr. 396) He also reported that there are zones of production at least three miles wide in an East-West direction. (Tr. 832)

54. At June 29, 1979, the date on which Mr. Johnson "clearlisted" the lands at issue, 38 sections totally or partially within the boundaries of the Fort had been subject to exploratory drilling. Of these 38 drilled sections, 23 (61%) were in commercial production, 10 (26%) had "shows" of gas. Only five sections (13%) had resulted in "dry" holes with neither a reported show of gas or production. (Ex. 26)

55. At June 29, 1979, three out of every four drilled sections north and south and two out of every three drilled sections east and west of the lands in question were in commercial production. (Ex. 26; Tr. 828, 829)

56. As early as 1968, the Arkansas Oil & Gas Commission by resolution expressed an opinion that the land in Fort Chaffee consisting of approximately 76,000 acres in an area "characterized by highly potential natural gas reserves" and that the area "embraces portions of at least five known geologic structures." (Ex. 1, Tr. 31)

57. By letter of July 19, 1968, to the USGS in Tulsa, the Commission listed the Grosse, Massard Prairie, Big Creek, Biswell Hill, Backbone, Game Hill, Pine Ridge, and Washburn Anticlines as "having possibilities" within the Fort Chaffee area. (Tr. 46)

58. At the time Mr. Johnson made his decision to lease the lands in question noncompetitively, commercially producing gas wells were present on the Biswell Hill, Washburn and Game Hill Anticlines. (Ex. 26, Ex. 34, Tr. 118, 127, 255, 256, 257, 258, 358, 359, 360, 363, 364, 377, 378, 402)

59. On the Biswell Hill Anticline, as many as eight producing wells, one testing well and three wells with shows of gas (indicating the presence of a gas reservoir, (Tr. 598)) existed on June 29, 1979, as was evidenced by the testimony of Mr. Black, Dr. Bartlett, and Exhibits 26 and 34.

60. As to the Washburn Anticline, there is no dispute. (Horton testimony, Tr. 741) Commercial gas production has existed on the Washburn since at least 1958. (Ex. 26, Ex. 34, *e.g.*, Sec. 8, T6N, 28W)

61. As to the Game Hill Anticline, Dr. Bartlett testified it had commercial gas production prior to June 29, 1979 (Tr. 377-378), the wells for example in Sec. 8, T7N 28W, Sec. 4 and 5, T7N 29W, as shown on Exhibits 26 and 34 clearly fall within the Game Hill Anticline, and no witness disputed the fact of production within the boundaries of that anticline.

62. From 1970 through 1973, competitive bidding for at least 17 sections within the Fort took place in connection with leasing to protect the government lands from drainage by lands outside the Fort. (Ex. 12, Ex. 36)

63. The successful bids in those years ranged from $46.00 to $200 per acre as shown by the following data from Exhibits 11, 12 and 26:

Section	Date	Successful Bid	Distance from Lands in Question
12/7N32W	1970	$ 91.40	5 sections
13/7N32W	1971	51.37	5 sections
18/7N31W	1970	46.00	4 sections
7/7N31W	1971	91.00	3 sections
34/8N31W	1972	121.25	3 sections
35/8N31W	1972	121.25	3 sections
36/8N31W	1973	121.25	3 sections
2/7N31W	1975	200.00	2 sections
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1/7N31W	1972	52.40	2 sections
6/7N30W	1972	78.25	2 sections
5/7N30W	1972	78.25	2 sections
7/7N30W	1975	151.51	1 section
8/7N30W	1975	151.51	1 section
9/7N30W	1972	52.40	Adjacent
10/7N30W	1972	52.40	Adjacent

64. Sections 11 and 12 of 7N31W, each one section distant from the lands in question were offered for competitive bid in 1974. Bids of $151.51 per acre were made on each section and rejected by USGS as too low. (Ex. 12, Ex. 26)

65. Arkla had requested that sections 15, 16 and 17 of 7N30W be placed for competitive bidding in 1974, but USGS declined to do so. (Ex. 9, Ex. 10, Ex. 12) Section 15 is within the lands in question.

66. As early as 1969, prior to the subsequent nearby development (Ex. 10), Arkla had specifically requested the opportunity to drill on the entire western 25 sections of the lands in question.

67. The Department of the Interior admits in the Girard report (Ad.Rec. 13a, pp. 17-18), "[t]here was no need to 'stimulate' exploration on the lands in question, because the exploration interest is already there."

68. Subsequent to June 29, 1979, on January 2, 1981, additional lands on Fort Chaffee immediately adjacent to the lands in question, were offered for competitive leasing. These lands were leased competitively for prices up to $4,007.00 per

acre. (Ex. 11, 12, received subject to later determinations; Tr. 142-158) More than $42,983,000 was bid. (Tr. 151)

69. Two recent reviews of federal leasing have resulted in recommendations that competitive leasing be expanded. An Interior Department staff committee studied the question in 1963 and recommended legislation which would have allowed the Secretary to require competitive bids for all lands lying within the exterior boundaries of an area known or believed to be within a productive geological province. Ad.Rec. 13 at 4. In 1970, the Public Land Law Review Commission concluded that competitive sales should be held whenever competitive interest can reasonably be expected. *Ibid.*

70. The Secretary of the Interior is vested with discretion in determining the extent of geologic structures. 30 U.S.C. § 189.

71. USGS is not permitted to "clearlist" an area for noncompetitive leasing until it has first done its geology on the area. (Tr. 467, 502, 737-738)

72. If a well is drilled and produces gas, the land drilled is "presumptively productive" and, therefore, within a KGS.

73. With respect to land that has not been drilled, the KGS determination cannot rationally be made without studying the stratigraphy, porosity, permeability, water and gas pressure. Available data in this regard include daily drilling reports, logs, isopachs, structure maps, reservoir pressure, hydrocarbon saturation and calculated porosity.

74. Over 200 wells had been drilled in the area in and around Fort Chaffee at June 29, 1979. (Ex. 26) A vast amount of geologic information was available as a result of the drilling of these wells and the exploration, public hearings, statutory and regulatory record keeping, and professional and scholarly articles dealing with the geology of the area.

75. This information was generally consolidated with the Arkansas Oil and Gas Commission at its offices in Fort Smith

and El Dorado, Arkansas, at the USGS offices in Tulsa, Oklahoma, and Little Rock, Arkansas.

76. Mr. Johnson had various data available to him. It is undisputed that as of June 29, 1979, the lands in question were virtually surrounded by producing wells. Further, 61% of the drilled sections within the Fort were in commercial production and an additional 26% had shows of gas. 75% of the drilled sections north and south of the lands in question, and 66% of the drilled sections east and west of the lands in question, were in commercial production. Commercial

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wells were in production on the Biswell Hill, Washburn and Game Hill anticlines.

77. Technical data available to Mr. Johnson also includes the following:

Type of Data	AOGC/ Ft. Smith	USGS Tulsa	USGS Little Rock	Use
National Gas Policy Act Determinations	T-13			Determine producing zones. T-82; prepare
Electric Logs	T14		T79	isopachs, T19
Lithologic Logs			T79	Cross sections, T21
Well Production Records	T14			
Well Completion Reports	T15		T80	
Dual Induction Lateral Logs	T15			Show strata; develop structural maps, T17
Formation Density Compensating Neutron Logs	T15			Determine porosity T16, 52, 53
Temperature Logs	T15			Indicates presence of gas, T20
Annual Reservoir Pressure Reports	T18			Determine areal extent of reservoirs T18, 58, 59, 370, 371
Subsurface structure maps reaching into Ft. Chaffee and TXO lease area	T19,61	T82		
Arkansas Field Rule Hearings	T20			Designate rules for area's new pools, T20
Cross sections of Ft. Chaffee area			T80,81	
Seismic Data on TXO Lease area		Ad. Rec. 13a p. 13; Johnson depo, p.109		

Type of Data	AOGC/ Ft. Smith	USGS Tulsa	USGS Little Rock	Use
PI Reports		T45	T80	
Arkla daily drilling reports, well logs, & completion reports for wells in sec. 6, 7, 8 &9/7N30W		T259: 28, 29		

78. Mr. Johnson used a map in his Tulsa office for clear listing. (Johnson depo. pp. 43, 76) Information was posted on the map by a draftsman who posted completed wells on the map. (Johnson depo., pp. 45-46)

79. Mr. Johnson admitted that his clearlisting map could not be recreated because it could have had mistakes on it.

80. Only well number, production and depth were reflected on the map. The map contained no information about geological structures, such as anticlines, no information about well completion dates, no information about depths of production, nor about shows of gas, nor height above sea level. (Johnson depo., pp. 76, 78-80) The map also showed the boundaries of KGSs, as previously determined by Mr. Johnson's office. (Johnson depo., pp. 177-178)

81. The information on the map was prepared from data obtained from the Petroleum Information Company, a private commercial reporting company. The data frequently contains faulty information.

82. KGSs are extended incrementally through the use of a "stepping-out" process.

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In order to extend a KGS, there must be production from each successive trap. (Tr. 650)

83. Mr. Johnson testified that in making KGS determinations in recent years, he would consider at most only the adjacent sections to a new producing well for purposes of expanding the KGS. (Johnson depo., p. 180, Tr. 744)

84. As a result of the application of the One Section rule to those lands which Mr. Johnson previously considered as being available for leasing, it was impossible for Mr. Johnson to have considered any of the lands in the interior of Fort Chaffee for possible inclusion in (or exclusion from) a KGS at any time prior to June 29, 1979. In fact, Mr. Johnson testified that he never had considered those lands for possible inclusion in a KGS.

85. He would not move a KGS beyond an adjacent section to a producing well under any circumstances in Arkansas because he "had been criticized" for doing so. (Johnson depo., p. 197)

86. Mr. Johnson used a definition of KGS that allowed him to expand a KGS into an area only if he thought that area would produce from the same specific trap, pool or reservoir as was producing in an adjacent section (Johnson depo., p. 193, Tr. 744)

87. This definition precluded Mr. Johnson from evaluating any of the structural or other scientific data available in determining the extent of a specific trap.

88. The procedure allegedly employed by Mr. Johnson would allow the expansion of a KGS area into an adjacent section only if Mr. Johnson felt the same specific trap extended that far. In reality, however, whenever a new producing well was reported, the adjacent squares were merely relabeled as KGS by a draftsman. In making these determinations, Johnson utilized none of the geological data available to him, and little, if any, of his expertise and training as a geologist. His approach was primarily, if not wholly, a clerical one which could have been done by almost anyone, with little or no geological training.

89. According to Mr. Emmett Finley, former DOI employee, it is not department policy to include production trends in a KGS just by virtue of the existence of such a trend. Under

legislation pertaining to Alaska mineral lands, a "favorable geologic province" concept is used. This is broader than the KGS concept now applied by the department. (Tr. 764)

90. Mr. Horton testified that the definitions explained in his testimony were those used by the department while Mr. Finley was employed there. Mr. Finley's interpretation as set forth in testimony was broad and under Mr. Finley's interpretation, the entire Arkoma Basin would have been made a KGS. (Tr. 643-645, 652)

91. Dr. Bartlett further testified that "presumptively productive" meant that "odds are that gas will be found." (Tr. 395) This is a much broader interpretation than the current DOI interpretation. See Tr. 647-648. (Tr. 688-689)

92. It is clear that what occurred in this case is that when oil or gas was located, the initial KGS was administratively assumed to be the equivalent of the state's well-spacing unit, in this case, one mile. Ad.Rec. 13.

93. The process of "clearlisting" is merely the application of KGS "determinations" to submitted non-competitive lease request forms.

94. When a non-competitive lease application comes in, it is checked, the KGS map is checked to make sure that it is up to date, and then the proposed lease areas are checked against it to determine whether they are in a KGS, a process known as clearlisting. (Johnson depo., p. 47)

95. Although KGS determinations were made on an ongoing basis over a period of years, this merely means that the current KGS map reflects years of application of the "adjacent square" rule.

96. As Mr. Horton made abundantly clear, Mr. Johnson did not make a KGS decision for the lands in question, he only "clearlisted" these lands (Tr. 711), a separate function from a KGS determination. (Tr. 711-712)

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97. No KGS determination has ever been made for the lands in question except to the extent the lands were "clear-listed." The clearlisting process includes no mineral evaluation (Tr. 714) and is literally a rubber stamping process. (Tr. 712)

98. It was Mr. Johnson's view that the KGS determination for the lands in question had, in effect, been made by the earlier KGS determinations around the lease area (Johnson depo., pp. 118, 119), made under his one section rule.

99. The evidence is overwhelming that Mr. Johnson had easily available to him an enormous amount of relevant and important geological information that he neither used nor considered using in making his "clearlisting" decision.

100. In making the decision, Mr. Johnson did not use seismic data available in the USGS office (Johnson depo., p. 109) and referred to in the Girard report (Ad.Rec. 13a at p. 13). He did not use and testified he did not know the use of a density neutron log (Johnson depo., p. 110) which is clearly an essential tool in determining porosity (Tr. 16, 52) and, indeed, he stated that calculated porosity was of no value in making a KGS determination, nor was hydrocarbon saturation considered. (Johnson depo., p. 116) He was uncertain about how to use temperature logs (Johnson depo., p. 111) on wells in or around the Fort.

101. He did not consider or use "shows" of gas as a basis for reaching conclusions as to the presence or extent of reservoirs (Johnson depo., pp. 114, 115), although all expert witnesses, including Dr. Zachry (Tr. 598), testified that shows of gas indicated the presence of a reservoir, and Mr. Finley testified that shows could "definitely" be used to extend a KGS. (Tr. 465)

102. Daily drilling reports which were available at USGS for wells in at least Sections 6, 7, 8 and 9 of T7N, R30W, on the Fort (Tr. 259), and which are helpful in determining the extent

of reservoirs (Tr. 260) were not considered by Mr. Johnson. He said such reports were of "no value" in making a KGS determination. (Johnson depo., pp. 115-116)

103. He did not consider including in a KGS any of the sections of the lands in question directly or diagonally offset by producing wells. (Ad.Rec. 13a, p. 15), although Mr. Horton testified that he could have included those sections as KGS. (Tr. 750)

104. He did not develop any subsurface maps of producing intervals although Mr. Horton said he could have done so with the data available. (Tr. 750-751) No effort was made to construct cross sections of the lease area. (Johnson depo., p. 117)

105. He did not consider the possible presence or lack of any faults in the area. (Johnson depo., p. 86)

106. Mr. Johnson testified that he did not perform the geological studies or use any of the scientific or structural data the government's own witness stated "should be used." (Tr. 743)

107. Mr. Johnson did not consider the lands' high probability of production and made no report to the Secretary on the mineral value of the lands or the high degree of competitive interest in the lands.

108. The types of information listed in Findings 96 through 107 were not given by the USGS to the Secretary or to the Bureau of Land Management for use in exercising the discretionary decision as to whether to lease any or parts of the lands in question.

109. Mr. Haley testified that there were too many productive wells for Mr. Johnson not to have considered the possibility that he should extend the KGSs more than one mile.

110. Dr. Charles Bartlett, the witness with the most extensive knowledge of the geology of the area in question,

described the procedures that Mr. Johnson used to govern his decision on the lands in question as so simple that no geologist would be needed and as "completely arbitrary" and requiring "no geologic thinking whatsoever." (Tr. 376,438)

111. The forms used by TXO to apply for leases on the lands in question, which are the same forms used by the government

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to issue the leases, are designated as "Offer to Lease and Lease for Oil and Gas—Noncompetitive Acquired Lands Lease—Form 3110-3 (September 1973)." (Ad.Rec. Nos. 15-34) Those forms (Form 3110-3) were not submitted by the Secretary of the Interior to the Secretary of Energy for review, modification, approval or disapproval at any time prior to the purported issuance of the leases in 1979. (Ad.Rec. Nos. 3-6; admissions in Ad.Rec. 8-9) Nothing in the record of this action indicates that the Secretary of Energy ever gave subsequent or retroactive approval of these forms.

112. On June 29, 1979, Mr. Johnson did not review any of the documents lodged with this Court and designated by the government as either "Administrative Record" or "Supplementation to the Administrative Record," with the exception of the TXO lease applications themselves. (By implication)

113. The "author" of the "known geological structure" language was Mr. Max W. Ball, former Chairman of the Oil Board of the Geological Survey (Tr. 458-59)

114. In the *Hearings Before the House Committee on the Public Lands on H.R. 3232 and S. 2812*, 65th Cong., 2d Sess. (1918), Mr. B.F. Rice testified that

> . . . an arbitrary distance in the oil business is not very satisfactory. It is in fact entirely unsatisfactory, because the arbitrary distance has nothing to do with the value of the land for the production of oil.
>
> * * * * * *

> That ("geologic structure") means a formation favorable to production, so far as it can be ascertained . . . .

115. Mr. Max W. Ball testified in the same hearing that "geologic structure" was equivalent to "domes and anticlines":

> I would say either substitute the Senate wording which is geologic structure, or the wording suggested by Mr. Hares in the letter read yesterday ("domes and anticlines").

116. In Conference Committee hearings of May 24, 1918, Mr. Elston said:

> There is no logic or any scientific reason for the (former) 10-mile limitation, because everything the gentleman says is true. Within a few miles from a producing well you can have a different geological structure and that territory be as wildcat as anything and you cannot find anything.

56 Cong.Rec. 7052 (May 24, 1918).

117. There is no evidence that Congress was aware, at the time of finally adopting the "known geological structure" language, of the Department of the Interior's definition of that term.

118. Even had Congress been aware of the department's definition of a KGS, that definition was crucially broader than that now urged by the department and as applied. *Compare Earl Brusselback*, A-28061 (Oct. 26, 1959), with Johnson depo. at 150-151.

119. A single producing trap of the stratigraphic nature characteristic of portions of the Fort Chaffee area can be as wide from east to west as three miles and as long from north to south as fifteen miles.

120. There is no rational basis underlying the application of the "one-mile" rule to Fort Chaffee where mineral development has been wholly precluded in the past by statute.

121. In regions of the nation open to exploration and development for decades it is possible that a rational basis

exists for a mileage system, in that it is likely that the industry would have prospected likely development areas and thus tested the boundaries of KGSs.

122. The clearlisting procedure utilized by Mr. Johnson has an inherently high probability of allowing clearlisting of lands which will ultimately be proven to be within a KGS in the Fort Chaffee area.

123. The noncompetitive acquired land leases awarded to TXO were not submitted to the Secretary of Energy in compliance with then-existing Department of Energy Organization Act requirements.

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124. The Administrative Record properly reviewable by this Court consists of Ad. Rec. 1, Ad.Rec. 3-9, Ad.Rec. 13a, Ad.Rec. 15-34, Ad.Rec. 39-52, Ad.Rec. 56-74.

Conclusions of Law

This action is before the Court pursuant to 26 U.S.C. § 1331, 5 U.S.C. §§ 702, 704, 30 U.S.C. §§ 191, 355, 42 U.S.C. § 7101 *et seq.* The Court has jurisdiction of the subject matter and of all parties. Venue is properly laid herein. 28 U.S.C. § 1391.

The scope of review of the administrative actions challenged herein is that this Court is required to hold unlawful and set aside the actions, findings, and conclusions which are arbitrary, capricious, an abuse of discretion, not in accordance with law, or without observance of procedure required by law. 5 U.S.C. § 706(2)(A), (D).

This Court in reviewing the administrative action must consider whether the procedures employed conform to the procedural requirements of the Administrative Procedure Act, as well as the Interior Department's own internal procedures and any other applicable statutory requirements. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707 (8th Cir.1979).

In consideration of the administrative decision, this Court must consider whether the decision was based on a consideration of the relevant facts and whether there has been a clear error of judgment. *Citizens Committee to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Congress, throught the 1976 Amendments to the Mineral Leasing Act, immediately opened Fort Chaffee to leasing, notwithstanding the contrary language of 43 C.F.R. § 310.1.2-1. *TXO v. Watt, supra.*

The administrative record is limited to the materials, documents, rationales, and justifications actually used, considered and relied upon by the agency official who made the determination at issue. *Securities and Exchange Comm. v. Chanary Corp.,* 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

Agency action cannot be upheld on the basis of *post hoc* rationalizations or arguments and data proffered for the first time on appeal. *Volpe, supra; Camp v. Pitts,* 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973).

The term "known geological structure" is contained in section 17 of the Mineral Leasing Act, 30 U.S.C. § 226(b)(1), which provides, *inter alia,* that:

> If lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible bidder by competitive bidding . . . .

The Congressional intent in adopting the term "known geological structure" can be ascertained from the Congressional history of the Mineral Leasing Act. This Congressional intent may be ascertained from the *Hearings Before the House Committee on the Public Lands on H.R. 3232 and S. 2812,* 65th Cong., 2d Sess. (1918); *Hearings Before the Senate Committee on Public Lands on H.R. 406,* 64th Cong., 1st Sess. (1916), and the Congressional Record.

The legislative history indicates that the term "geological structure" was intended to refer to producing domes or anticlines.

The legislative history indicates that Congress, in enacting the Mineral Leasing Act, intended to encourage exploration and development of areas in which the exploration interest was then relatively small and the risk relatively high. Conversely, Congress intended to promote competition in those areas in which exploration interest was already present and the risks substantially smaller. *See also Atlantic Richfield Co. v. Hickel,* 303 F.Supp. 724 (D.Wyo. 1969), *aff'd* 432 F.2d 587, 589 (10th Cir.1970).

In 1935, Congress replaced the term "known geological structure" with "known or believed to contain oil or gas deposits." In 1946, Congress reverted to the "geologic structure" language to end the confusion in the industry that resulted from the 1935 revision. *See Hearings Before the Senate Committee on Public Lands and Surveys,* 79th Cong., 2d Sess. (1946).

The current departmental regulation defining "known geological structure," adopted in 1970, equated this term with:

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> . . . technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

43 C.F.R. § 3100.0-5(a) (1979) is clearly inconsistent with the Congressional intent that "known geological structure" be equated with "domes and anticlines."

In *Wilmer Jeannette,* 49 I.D. 582 (Oct. 16, 1920), the Department of the Interior expressly considered the "incentive" factor in a KGS determination. In *Practice Applicable to the Issuance of Oil and Gas Prospecting Permits and Extensions of Time for Compliance with Drilling Requirements,* 50 I.D. 546 (June 3, 1924), the department's policy officially adopted the

incentive factor in KGS determinations and recognized a broader KGS definition than the one now urged by the department. In *H.A. Hopkins,* 50 I.D. 213 (Dec. 18, 1923), the department officially defined a KGS in a manner similar to that now urged by plaintiffs. The department utilized a broad application and definition of KGS "traps" for at least four decades after the passage of the Act. *See John P. Dever,* 67 I.D. 367 (1960); *Earl Brusselback,* A-28061 (unreported) (Oct. 26, 1959).

The Congressional History indicates that Congress, in delineating the boundaries between KGS and non-KGS lands, has rejected a system of arbitrary mileage.

The clearlisting procedure utilized in the instant case as an application of the KGS determination to TXO's lease request forms was inconsistent with the language and meaning of section 17 of the Mineral Leasing Act.

The clearlisting procedure was arbitrary because it was not based upon the clearly defined relevant factors for making a KGS determination. And this is so even if Congress intended the KGS area to be the "trap" area. The procedure was arbitrary in that it ignored the previous statutory unavailability of any meaningful industry testing, exploration or development.

Secretarial Order 2948, signed by Rogers C.B. Morton, then-Secretary of the Interior in 1972, evidences the departmental policy and Congressional intent that competitive interest be considered by the Secretary in exercising his discretion. The clearlisting procedure employed by Mr. Johnson failed to comply with the spirit of the Order and with sections 3(b) and 4 of the Order which require reports on proposed transactions and mineral evaluation data to be submitted to the Bureau.

In 1977, Congress enacted the Department of Energy Organization Act to, among other things, foster and assure competition among parties engaged in the supply of energy and fuels.

The DOE Act, as in effect as of July, 1979, transferred to the Secretary of Energy the functions of the Secretary of the Interior to promulgate regulations under the Mineral Leasing Act for Acquired Lands and Mineral Lands Leasing Act, relating to the fostering of competition for Federal leases. Section 303(c)(1) required the Secretary of the Interior to afford the Secretary of Energy at least thirty (30) days' notice prior to prescribing the terms and conditions on which a lease will be issued, and the Secretary of Energy could then disapprove a term or condition.

The Appropriations Act for the Department of the Interior —Fiscal Year 1982, Pub.L. No. 97-100, Title II, § 201, 95 Stat. 1407 (Dec. 23, 1981), repealed §§ 302(b), 302(c) and 303(c) of the DOE Act. This repeal, however, repealed only the transfer of the duty of fostering competition to the Secretary of Energy, not the substantive obligations of the Secretary of the Interior.

Having considered the objections to portions of the depositions of Joseph R. Binford, Jeff Holdren, and Edward Johnson, the Court concludes that to the extent said portions were relied upon by the Court with respect to the findings of fact and conclusions of law expressed herein, said objections are overruled.

All evidence admitted at the trial of this cause other than what the Court has determined to be the Administrative Record was admitted for the purposes of delineating the scope of the Administrative Record, deter-

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mining the adequacy or inadequacy of the facts considered by the Secretary and providing the Court with technical understanding of the data submitted.

The non-competitive Fort Chaffee leases issued to TXO, "clearlisted" by Mr. Johnson in June, 1979, are invalid for the reasons set forth in these findings of fact and conclusions of law.

The Secretary of the Interior should be enjoined from issuing further leases of the Fort Chaffee mineral lands until a proper KGS determination is made by the United States Geological Survey.

In making any future KGS determinations, the following factors, among others, need be considered: the Congressional intent in exploration and development of areas in which the exploration interest is relatively slight and the risk relatively great; the Congressional intent to promote competition in those areas wherein exploration interest is already present and the risks substantially less; that Fort Chaffee was statutorily closed to exploration and development until 1976; the data and reports required by Secretarial Order 2948 and any other statutes or rules must be updated and considered prior to the issuance of a lease; the percentage of productive sections within the Fort, including "shows," and the percentage of productive sections surrounding the Fort; the technical data listed in Finding No. 77 must be considered; an arbitrary mileage system of "stepping out" may not be used; all geological data currently available to the department, including production trends, need be considered; in determining and applying the true definition of the term "known geological structure" consistent with Congressional intent, the clearly expressed Congressional purpose in providing the State of Arkansas and its counties and schools with a "fair" return on the value of the lands and minerals acquired from the State of Arkansas by the federal government, should be considered.

EXHIBIT 6

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ARKLA EXPLORATION COMPANY
and State of Arkansas, Appellees,

v.

TEXAS OIL & GAS CORP., Appellant.

James G. Watt, Secretary of Interior. (Two cases).

ARKLA EXPLORATION COMPANY
and State of Arkansas, Appellees,

v.

TEXAS OIL & GAS CORP., James G. Watt, Secretary of Interior, Appellant. (Two cases).

Nos. 82-2228, 82-2386, 83-1586 and 83-1682.

United States Court of Appeals, Eighth Circuit.

Submitted Sept. 15, 1983.

Decided May 7, 1984.

An action was brought seeking cancellation of leases of certain government lands for oil or gas exploration. The United States District Court for the Western District of Arkansas, 562 F.Supp. 1214, H. Franklin Waters, Chief Judge, determined that the leases were not validly issued, and appeal was taken. The Court of Appeals, Bowman, Circuit Judge, held that since Department of Interior applied an arbitrary mileage rule without even considering geological information or competitive

interest, determination that lands on military reservation were not within "known geological structures of producing oil or gas fields" was unlawful.

Affirmed.

John R. Gibson, Circuit Judge, filed dissenting opinion.

1. Federal Courts —1158

Order of District of Columbia District Court ruling on timeliness of applications for lease of government land for oil or gas exploration without competitive bidding and order of Arkansas District Court concerning lawfulness of determination that the leased lands were not within a known geological structure of a producing oil or gas field were not mutually inconsistent and therefore the Arkansas District Court did not abuse its discretion in denying lessee's motion to transfer to D.C. District Court case in which an exploration company sought cancellation of the leases. 28 U.S.C.A. § 1404(a).

2. Federal Courts —103, 819

Motion for transfer is addressed to discretion of trial court and its actions will not be disturbed on appeal unless there has been an abuse of discretion. 28 U.S.C.A. § 1404(a).

3. Federal Civil Procedure —103

In order to have standing a plaintiff must allege an actual or threatened injury as a result of conduct of the defendant, injury alleged by plaintiff must be fairly traceable to action of defendant that is challenged in the lawsuit and injury alleged must be likely to be redressed by a favorable decision of the court. U.S.C.A. Const. Art. 3, § 1 et seq.

4. Mines and Minerals —6.1(9)

Exploration company, which asserted right to bid competitively for lease of certain government lands, and state of Arkansas, which alleged the loss of revenue to

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which it was statutorily entitled, had standing to challenge determination of Department of Interior that it could lease, without competitive bidding, certain lands for oil or gas exploration. U.S.C.A. Const. Art. 3, § 1 et seq; 30 U.S.C.A. § 226c.

5. Mines and Minerals —5.1(9)

Private right of action existed under Mineral Lands Leasing Act to challenge validity of leases awarded by Secretary of the Department of Interior. Mineral Lands Leasing Act, § 42, as amended, 30 U.S.C.A. § 226-2.

6. Mines and Minerals —5.1(9)

Determination of Secretary of Department of the Interior that certain government lands are not within a known geological structure of a producing oil or gas field and therefore may be leased without competitive bidding is subject to review under Administrative Procedure Act. 30 U.S.C.A. § 226c, 5 U.S.C.A. § 701(a)(2).

7. Mines and Minerals —5.1(9)

Since leases of government land for oil and gas exploration had been invalidated at time plaintiff's protest was dismissed as moot, plaintiff was not "adversely affected" by an administrative decision at time when its protest was dismissed and therefore could not have taken an administrative appeal from the dismissal; thus, plaintiff did not fail to exhaust its administrative remedies so as to be precluded from seeking cancellation of the leases, which had been reinstated.

8. Administrative Law and Procedure —229

If agency's limited power to grant relief or agency's hostile attitude makes it impossible or highly improbable that the litigant will obtain relief it seeks, exhaustion of administrative remedies will not be required.

9. Administrative Law and Procedure —229

Doctrine of exhaustion of administrative remedies is not a strict jurisdictional requirement, but rather a flexible concept which must be tailored to the circumstances of the particular case.

10. Limitation of Actions —130(5)

Statute of limitations was not a bar to action seeking cancellation of leases for oil or gas exploration on government lands without competitive bidding where plaintiff, which originally filed suit challenging the leases within 90-day statutory period, whose suit was dismissed without prejudice after the leases were invalidated and which commenced subsequent action seeking cancellation within a few days after reinstatement of the leases, acted properly and did everything to protect its interests in the matter that reasonably could have been expected of it. Mineral Lands Leasing Act, § 42, as amended, 30 U.S.C.A. § 226-2.

11. Limitations of Actions —1

Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights.

12. Judgment —634

Use of collateral estoppal is appropriate when the issue was identical to the one in a prior adjudication, there was a final judgment on the merits, the estopped party was a party or

in privity with a party to the prior adjudication, and the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

13. Judgment —715(3)

Since prior adjudication between the parties did not involve issue as to validity of a United States Geological Survey determination that the subject lease property was not within a known geological structure of a producing oil or gas field, plaintiff and intervenor were not collaterally estopped from seeking cancellation of leases for oil or gas exploration without competitive bidding on ground that the property was within a known geological structure of a producing oil or gas field.

14. Administrative Law and Procedure —784

Reviewing court must ascertain if administrative decision was based on a con-

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sideration of the relevant factors, and in doing so must conduct a thorough, probing, in-depth review of the record.

15. Administrative Law and Procedure —774

When court reviews agency action, it may not consider evidence outside administrative record for purpose of substituting its judgment for that of the agency.

16. Administrative Law and Procedure —744

Unless an inadequate evidentiary development before the agency can be shown and supplemental information submitted by the agency does not provide an adequate basis for judicial review, court, in conducting plenary review or agency action, should limit its inquiry to the administrative record already in existence supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature.

17. Mines and Minerals —5.1(9)

District court, which admitted the supplementary evidence of an explanatory nature, did not err in the scope or methodology of its review of decision of Secretary of Department of Interior that subject leased lands were not within a known geological structure of a producing oil or gas field.

18. Mines and Minerals —5.1(1,4)

Since Department of Interior applied an arbitrary mileage rule without even considering geologic information or competitive interest, determination that lands on military reservation were not within "known geological structures of producing oil or gas fields" was unlawful. 30 U.S.C.A. § 226c.

F. Henry Habicht, II, Acting Asst. Atty. Gen., W. Asa Hutchinson, U.S. Atty., Fort Smith, Ark., Anne S. Almy, Michael W. Reed, Robert L. Klarquist, Attys., Dept. of Justice, Washington, D.C., for appellant; Mark K. Seifert, Atty., Dept. of the Interior, Washington, D.C. of counsel.

Jim Guy Tucker, Mitchell, Williams, Selig, Jackson & Tucker, Little Rock, Ark., Robert Roberts, III, Blanchard, Walker, O'Quin & Roberts, Shreveport, La., Alan S. Novins, Lee Ellen Helfrich, Paula Dinerstein, Lobel, Novins & Lamont, Washington, D.C. for appellees.

Before LAY, Chief Judge, and JOHN R. GIBSON and BOWMAN, Circuit Judges.

BOWMAN, Circuit Judge.

Under the Mineral Lands Leasing Act (MLA), 30 U.S.C. §§ 181-287, before government lands may be leased for oil or gas exploration without competitive bidding, the Secretary of the Interior (the Secretary) must determine that the lands are not within a "known geological structure of a producing oil or gas field" (KGS). *Id.* at § 226. At issue in this case in whether

the Secretary made a proper KGS determination before granting valuable oil and gas exploration leases to Texas Oil and Gas Corporation (TXO) on a noncompetitive basis. This District Court for the Western District of Arkansas* held that the Secretary's determination was improper and therefore, that these leases were not validly issued. The Secretary and TXO appeal from that decision. For the reasons stated herein, we affirm the decision of the district court.

Procedural History

The twenty noncompetitive leases in question, covering lands located on the Fort Chaffee Military Reservation in Arkansas, were issued to TXO on July 1, 1979. Having learned of these leases, Arkla Exploration Company (Arkla) filed an administrative protest against their issuances with the Department of Interior (the Department) on September 17, 1979.[1] On September 20, 1979, the Secretary ordered the United States Geological Survey (USGS, now know as the Minerals Management Service) to re-evaluate its non-KGS classification of the subject lease

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land. On September 21, 1979, Arkla filed suit against the Secretary in the District Court for the District of Columbia (D.C. District Court), seeking cancellation of the leases.[2]

In response to these developments TXO, on November 1, 1979, sought from the D.C. District Court an order temporarily restraining the Secretary from canceling its leases. A hearing on the TRO was scheduled for November 2, 1979. On the evening of November 1, 1979, the Secretary invalidated the leases, reasoning that they had been issued without proper authority, notwithstanding the passage of an amendment to the MLA permitting the granting of leases on acquired military lands

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* The Honorable H. Franklin Waters, Chief Judge, presiding.

[1] The protest was dismissed as moot on January 3, 1980.

[2] For a discussion of the disposition of this suit see *infra* note 3.

such as Fort Chaffee, *see infra* note 6 and accompanying text, because the lease applications had been filed prior to the effective date of the Department's implementing regulations.

TXO subsequently converted its suit for a TRO to one for permanent relief. The D.C. District Court held in favor of the Secretary. *Texas Oil & Gas Corp. v. Andrus,* 498 F.Supp. 668 (D.D.C.1980). The court found that the Secretary's decision to invalidate the leases was based on his reasonable interpretation of the Department's regulations and was not the result of improper political motivation.[3]

The Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed, *Texas Oil & Gas Corp. v. Watt,* 683 F.2d 427 (D.C.Cir. 1982), *rev'g Texas Oil & Gas Corp. v. Andrus, supra,* and on July 20, 1982, directed the Secretary to reinstate the leases.[4] The court refused to allow the Secretary to invalidate the leases based on his interpretation of Department regulations because to do so would unilaterally defer the effective date of the amendment to the MLA and thus would thwart Congressional intent to open these lands for leasing.

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[3] Arkla's suit to cancel the leases, *Arkla Exploration Co. v. Andrus,* was held in abeyance pending the outcome of *Texas Oil & Gas Corp. v. Andrus.* After the decision in *Texas Oil & Gas Corp. v. Andrus,* the parties to *Arkla Exploration Co. v. Andrus* filed a joint stipulation subject to court approval that further proceedings in their action be stayed pending final appellate review in *Texas Oil & Gas Corp. v. Andrus.* Rather than approving the stipulation, the D.C. District Court ordered that the case be dismissed "without prejudice and with all rights preserved to each party." *Arkla Exploration Co. v. Andrus,* Civ. No. 79-2501 (D.D.C. Oct. 10, 1980) (order dismissing case). The court felt this was appropriate considering the uncertainty of the timing of appellate review. *Id.*

[4] The D.C. Circuit decided the case on June 11, 1982. It was not until July 20, 1982 that the opinion and judgment of the D.C. Circuit, serving as its mandate, were transmitted to the D.C. District Court.

The instant action attacking the KGS determination was commenced by Arkla on August 4, 1982. The State of Arkansas petitioned the court for leave to intervene on August 18, 1982.[5] The district court has issued two opinions in the case. In the first opinion, the court permitted the State of Arkansas to intervene, and overruled various jurisdictional objections raised by the defendants. *Arkla Exploration Co. v. Watt*, 548 F.Supp. 466 (W.D.Ark.1982). In the second opinion, the court ruled on the merits. *Arkla Exploration Co. v Watt*, 562 F.Supp. 1214 (W.D.Ark.1983). The court reviewed the administrative record, admitted supplementary and explanatory evidence, made findings of fact, and ruled that the Secretary's determination that the lands in question fell outside a KGS was arbitrary and contrary to Congressional intent, federal statutes, and the Department's regulations. The court enjoined the Secretary from reinstating the leases and ordered the Secretary to make a proper KGS determination on the lands in question prior to the issuance of any further leases.

Background

In 1975, Congress passed an amendment to the MLA authorizing for the first time

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minerals leasing (other than for drainage purposes) on government lands required as military reservations, as distinguished from lands that always have been in the public domain.[6] Fort Chaffee is among the lands opened for leasing under this statute. Geologically, Fort Chaffee is

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[5] Arkansas's intervention was prompted by a 1981 Congressional enactment which entitles a state to 50 per cent of the revenues from sales, bonuses, royalties, and rentals of public lands within the state's borders. *See* 30 U.S.C. §§ 191, 355.

[6] Federal Coal Leasing Act Amendments of 1975, Pub.L. No. 94-377, 90 Stat. 1083 (1976) (codified at 30 U.S.C. § 181).

located in the Arkoma Basin, which has been a very productive natural gas area for many years. The area surrounding Fort Chaffee contains numerous producing wells. A study of maps included in the administrative record reveals that no part of Fort Chaffee was more than five miles from a producing well at the time the leases in question were granted. Designated Record (D.R.) at 1115. The maps also show that much of Fort Chaffee is within the Biswell Hill, Game Hill or Washburn Anticlines,[7] each of which contained producing wells at the time these leases were granted.

In May 1977, TXO applied to the Bureau of Land Management (BLM) for 38 noncompetitive oil and gas leases on 78,000 acres located in the Fort Chaffee Military Reservation. Departmental procedures assigned to the Area Geologist of the USGS the responsibility for determining whether the lands in question were located within a KGS. For Fort Chaffee, the Area Geologist at that time was Edward L. Johnson in the Tulsa, Oklahoma USGS office. Johnson went to work for USGS in 1956, and had worked in the Tulsa area since at least 1961.

Johnson took the TXO applications and compared them to a map of the Fort Chaffee area. This map displayed the wells drilled in the Fort Chaffee area as reported by the Petroleum Information Co., a petroleum reporting service. Each well, both producing and dry wells, was entered on the map by a draftsperson in Johnson's office. Johnson then would indicate the location of each KGS on the map, including in the KGS, for each well producing in commercial quantities, the section (a section is one square mile) in which the well is located plus the surrounding eight sections. This practice, referred to in the district court as the "one mile stepout," had its roots in

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[7] An anticline is a fold in the earth with sides sloping down from a common crest. It appears on the surface, if at all, as a hill, but it does not necessarily appear on the surface. A syncline is an inverted anticline, *i.e.*, sides sloping downward into a valley, meeting at the bottom of a curve or fold in the earth.

ARK.STAT.ANN. § 53-114 (1971 & Supp. 1983), which gives the Arkansas Oil and Gas Commission the authority to set spacing units for oil and gas wells in Arkansas, *i.e.*, no wells can be drilled closer than the minimum spacing unit set by the Commission.[8] Occassionally, if the well was a noncommercial well, *i.e.*, a well that produced but which did not produce enough to cover the costs of production, Johnson would include only the single section in which the well was located. It was his practice not to extend any KGS more than one section beyond the section in which the well was located. In fact, Johnson had been "criticized" on occasions when he had attempted to extend a KGS farther than one section, and had stopped even attempting to do so.

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The process followed by Johnson in approving the TXO leases is called clearlisting. Theoretically, prior KGS determinations already were represented on the map in his office. In dealing with the TXO applications, he identified the areas sought to be leased on the map and determined if any of them were within an area previously identified through the one-mile stepout procedure as a KGS. This process took Johnson approximately three and one-half hours. It resulted in the deletion of about 45,000 acres from TXO's application and left about 33,000 acres available for noncompetitive leasing. Twenty noncompetitive leases encompassing those 33,000 acres

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[8] The Arkansas Oil and Gas Commission uses a one-section spacing unit to separate oil and gas wells so as to prevent a field from being drained at too rapid a rate. The Director of the Commission testified that this one-section rule is only a starting point and that after a well is established as a producer, a hearing is conducted to determine the actual spacing unit for each new well. Tr. at 66-67.

The one-section stepout used by the Tulsa USGS office used the basic section township and range platting of the State of Arkansas. Thus, assuming that the maximum stepout was used, a KGS extension for a given well might appear as depicted below.

were approved in this manner by Johnson and forwarded to the BLM, where they were approved and issued to TXO on July 1, 1979.

In reviewing the Secretary's decision to issue the leases without competitive bidding, Judge Waters was faced with an administrative record of approximately 1580 pages. The record consisted primarily of TXO's lease applications, the leases, and a number of articles and reports describing the geology of the Fort Chaffee area, several of which had been written by experts who testified at trial. The record also included some prior KGS determinations on which the clearlisting decision for the TXO leases had been based. In only one of these prior KGS determinations had the Tulsa office extended a KGS farther than the ordinary one-mile maximum from a producing well—the Washburn Anticline KGS determination, made on October 29, 1963, D.R. at 235-39. None of the KGS determinations made after that date extend more than one section beyond a producing well. Indeed, a review of the KGS determinations made under the one-mile stepout procedure gives one little indication of any geologic research or analysis conducted in connection with such determinations. The language of the reports accompanying each successive determination is so similar as to resemble boilerplate.

The administrative record also contains the Girard Report. Prepared by O.W. Girard, a USGS geologist, this report is the official Department internal review of the KGS determination at issue in the instant case. While the report concludes that the KGS determination was correct "in a legal sense," it also concludes that "more comprehensive use" could have been made of the geologic data available to the Tulsa office, "such as constructing a variety of subsurface geological and reservoir engineering maps in order to 'geologically' confirm the determination." D.R. at 415-16. The Girard Report also notes the total

failure of the Tulsa office to consider exploration interest in the Fort Chaffee area in making the KGS determination and the clearlisting decisions for the TXO leases. *Id.* at 416-17.

A crippling weakness of the administrative record was the omission of the map used by the Tulsa USGS office in making the clearlisting decisions. By the time this case reached the district court, the map no longer existed. Without this map, it was impossible for Judge Waters to know which wells surrounding the lease area were considered and which were not considered in making the KGS determination and the clearlisting decisions here at issue. In his deposition, Johnson testified that the map could not be recreated because it may have had mistakes in it. Johnson deposition at 76-77.

Judge Waters was confronted with an administrative record that raised many more questions than it answered about the basis of the Secretary's decision. He therefore found it necessary to admit a limited amount of additional information, including testimony from Johnson and his superiors, to determine the true scope of the administrative record and cure its factual deficiencies, particularly the lack of the map used in making the clearlisting decisions.

Even if the administrative record had been complete, Judge Waters was faced with another problem—the highly technical nature of the field of petroleum geology. Judge Waters is not a geologist and, without what amounted to a short course in the subject, given in open court by experts for

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both plaintiffs and defendants, he cound not have been expected to review the administrative record intelligently. As Judge Waters explained:

> All evidence admitted at the trial of this cause other than what the Court has determined to be the Administrative Record was admitted for the purposes of determin-

> ing the scope of the Administrative Record, delineating the adequacy or inadequacy of the facts considered by the Secretary and providing the court with technical understanding of the claim submitted.

562 F. Supp. at 1226-27.

Issues

TXO and the Secretary argue for reversal on numerous procedural and jurisdictional grounds: (1) improper venue; (2) lack of standing; (3) unavailability of a cause of action; (4) failure to exhaust administrative remedies; (5) statute of limitations; and (6) collateral estoppel. They also argue that the standard of review applied by the district court was improper and that the Secretary's KGS determination was correct. We address these issues in turn.

Venue

[1] On August 13, 1982, TXO, pursuant to 28 U.S.C. § 1404(a), moved the district court to transfer venue in this case to the D.C. District Court. After a hearing before the district judge, TXO's motion for change of venue was denied. TXO and the Secretary argue that denial of this motion was improper.

[2] "A motion for transfer under 28 U.S.C. § 1404(a) is addressed to the discretion of the trial court and its actions will not be disturbed on appeal unless there has been an abuse of discretion." *Layne-Minnesota p.r., Inc. v. Singer Co.*, 574 F.2d 429 (8th Cir. 1978). We have examined the record and find that the denial of TXO's motion for change of venue was not an abuse of discretion.

The thrust of appellants' venue challenge is that they may be subjected to two orders—one from the D.C. Circuit and one from this Circuit—that are mutually inconsistent. The D.C.

Circuit, however, ruled only on the timeliness of TXO's lease applications under applicable federal statutes and has ordered only that TXO's leases be reinstated "[a]s matters stand . . . ." 683 F.2d at 435. That Court did not consider the KGS issue. Its ruling presupposes that the leases were issued in accordance with the applicable law and that the leased lands are not within a KGS. For our Court to require the Secretary to offer these lands for lease only after a lawful KGS determination does not conflict with the decision of the D.C. Circuit, to which this issue never has been presented. Because we hold these leases invalid notwithstanding the timeliness of TXO's application for them, our mandate necessarily supersedes that of the D.C. Circuit. The parties should not have any doubt that the instant decision now controls this matter.

Standing

[3] TXO and the Secretary argue that neither Arkla nor the State of Arkansas has standing to assert the claims now before the Court. Having reviewed the entire record, we conclude that both parties meet the Article III standing requirements.

In order to have standing:

> (1) plaintiff must allege an actual or threatened injury as a result of the conduct of the defendant, (2) the injury alleged by the plaintiff must be fairly traceable to the action of the defendant that is challenged in the lawsuit and (3) the injury alleged by plaintiff must be likely to be redressed by a favorable decision of the court.

Belles v. Schweiker, 720 F.2d 509, 513 (8th Cir. 1983) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982)).

[4] The district court accurately characterized the nature of Arkla's rights,

> Arkla's asserted right is the right to bid competitively on KGS tracts of land which the Secretary has reasonably class-
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> ified and offered. Correlatively, they assert the rights to have the lands not classified arbitrarily, to have the Secretary utilize his discretion properly, and the right to bid for all properly categorized and offered KGS lands for potential profit and exploratory public benefit.

548 F.Supp. at 471. Arkla alleges injury in that these rights were violated with respect to the subject lease land. The injury alleged by the State of Arkansas is the loss of revenue to which it is statutorily entitled.[9] These injuries claimed by Arkla and the State of Arkansas are fairly and directly traceable to the Secretary's unlawful KGS determination. Moreover, a proper KGS determination will protect Arkla's interest in having an opportunity to participate in a lawful bidding process and Arkansas's statutory revenue interest. Thus, our decision provides redress for the injuries alleged by Arkla and the State of Arkansas. We accordingly hold that the criteria for standing set forth in *Belles v. Schweiker, supra,* are satisfied.

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[9] Under 30 U.S.C. § 191, a state is entitled to 50 per cent of revenues derived from the lease of public lands located within its borders. Mineral leases are granted noncompetitively if the relevant land is not within a KGS, while land that is within a KGS must be leased competitively. The district court recognized the significance of this with respect to the State of Arkansas:

> Clearly, if the Fort Chaffee tracts are irrationally classified as non-KGS areas, the State will lose one-half of all the money which would have been received from the rental of these lands, which, instead, will accrue to the benefit of whichever oil corporation is involved. Conversely, if the tracts are KGS lands, the State of Arkansas stands to gain tens of millions of dollars from a correct and adequate classification procedure in accordance with law.

548 F. Supp. at 472.

Availability of Cause of Action

[5] The MLA, 30 U.S.C. § 226-2, clearly contemplates the right of adversely affected parties to seek judicial review of leases awarded by the Secretary. *See, e.g., Copper Valley Machine Works, Inc. v. Andrus,* 474 F.Supp. 189, 192 (D.D.C.1979), *vacated on other grounds,* 653 F.2d 595 (D.C.Cir.1981) (recognizing statutory judicial review procedure of § 226-2; *Geosearch, Inc. v. Andrus,* 494 F.Supp. 978, 979 (D.Wyo.1960) (jurisdiction of court founded on § 226-2). Judicial review must of course, be sought in a timely fashion, after the avenues of administrative relief have been adequately explored. Arkla and the State of Arkansas meet these requirements and, thereby, have available to them this cause of action.

TXO and the Secretary maintain that neither Arkla nor the State of Arkansas has a cause of action in federal court because no private right of action exists under the MLA. In making this argument, appellants rely on *Pullman v. Chorney,* 712 F.2d 447, 450 (10th Cir.1983) and *Naartex Consulting Corp. v. Watt,* 542 F.Supp. 1196, 1202-03 (D.D.C.1982), *aff'd* 722 F.2d 779 (D.C.Cir.1983). But *Pullman* and *Naartex* merely refused to imply a private right of action for damages or other relief against private defendants under the MLA. The existence of an implied private right of action against private defendants is one thing; judicial review of an agency decision is quite another. Arkla and the State of Arkansas have sought only judicial review of final agency action, which is precisely what § 226-2 authorizes.[10]

[6] TXO and the Secretary also argue that KGS determinations are committed to agency discretion by law and thus are unreviewable under 5 U.S.C. § 701(a)(2). This provision of

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[10] Arkla seeks no relief against TXO. TXO was joined as a defendant only because Arkla believed that TXO might claim an interest in the leases or lands that are the subject of this action. In its pleading, Arkla states its uncertainty that TXO is even a necessary party. *See* D.R. at 78.

the Administrative Procedure Act (APA) applies only if there is "clear and convincing evidence" of Congress's intent to preclude judicial review. *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-41, 87 S.Ct. 1507, 1510-11, 18 L.Ed.2d 681 (1967). We find no such evidence in this case. TXO and the Secretary point out that 30 U.S.C. § 189 gives the Secretary

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the authority to determine the boundaries of a KGS, and cite one congressman's comment in the legislative history referring to that section,[11] but they do not point to any express provision of the MLA that precludes review. As stated in *Abbott Laboratories:* "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative interest." *Id.* 387 U.S. at 141, 87 S.Ct. at 1511 (quoting Jaffe, Judicial Control of Administrative Action 336, 357 (1965).

Exhaustion of Administrative Remedies

[7] The TXO leases were granted on July 1, 1979. On September 17, 1979, Arkla filed a timely protest to the issuance of the leases. The Secretary, on September 20, 1979, ordered the USGS to re-evaluate the non-KGS classification of the leased land. On November 1, 1979, the Secretary invalidated TXO's leases. The BLM then dismissed Arkla's protest as

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[11] TXO does cite one case holding that the Secretary's KGS determination is unreviewable. *Wann v. Ickes,* 92 F.2d 215 (D.C.Cir. 1937). That case, however, has been overtaken by events and does not represent the current law. (1) *Wann* was decided before passage of the APA and before the Supreme Court's decision in *Abbott Laboratories,* both of which considerably clarified and expanded the scope of judicial review; (2) *Wann* was decided under an amendment to the MLA which is no longer in effect. At that time the Secretary was required to lease lands competitively if the lands were "known or believed to contain oil or gas deposits"—a more subjective test than the KGS language now in effect. 30 U.S.C. § 226, *as amended by* Act of August 21, 1935, 49 Stat. 676, *amendment repealed by* Act of August 8, 1946, 60 Stat. 950.

moot. TXO and the Secretary argue that Arkla has failed to exhaust its administrative remedies because it did not appeal the dismissal of its protest. We do not agree.

Without first being an "adversely affected" party, Arkla had no right to an administrative appeal of the dismissal of its protest. *See, e.g.*, 30 C.F.R. § 290.7; 43 C.F.R. §§ 4.21, 4.410. By the time Arkla's protest was dismissed, the TXO leases had been invalidated. Therefore, it cannot be said that Arkla was "adversely affected" by an administrative decision when its protest was dismissed on ground of mootness. After all, the very result it sought—invalidation of the TXO leases—has been achieved. Under the circumstances, an administrative appeal would have been pointless. Thus, on the particular facts of this case, Arkla has done all that was necessary to satisfy the exhaustion requirement.

[8] The State of Arkansas never had an opportunity to pursue administrative remedies. It was not an interested party until 1981, when Congress amended the MLA to entitle the states to share in revenues derived from the lease of public lands. *See supra* notes 5 and 9. At that time, there was no reason for any administrative challenge to these leases because the Secretary had invalidated them. When the D.C. Circuit then issued a mandate ordering the Secretary to reinstate the leases, it became highly improbable that the State of Arkansas could ever obtain relief in the context of an administrative proceeding. "[I]f the agency's limited power to grant relief or the agency's hostile attitude makes it impossible or highly improbable that the litigant will obtain the relief [it] seeks," exhaustion will not be required. *West v. Bergland*, 611 F.2d 710, 719 n. 11 (8th Cir.1979), *cert. denied*, 449 U.S. 821, 101 S.Ct. 79, 66 L.Ed.2d 23 (1980).

[9] "The doctrine of exhaustion of administrative remedies is not a strict jurisdictional requirement, but rather a flexible concept which must be tailored to the circumstances of the particular case." *South Dakota v. Andrus*, 614 F.2d 1190, 1192 n.1 (8th Cir), *cert. denied*, 449 U.S. 822, 101 S.Ct. 80, 66 L.Ed.2d (1980). Because of the circumstances mentioned above, we hold that the doctrine of exhaustion of administrative remedies is not a bar to this action.

Statute of Limitations

[10] "No action contesting a decision of the Secretary involving any oil and gas lease shall be maintained unless such action is commenced or taken within ninety days after the final decision of the Secre-

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tary relating to such matter." 30 U.S.C. § 226-2. TXO and the Secretary argue that this statute of limitations bars the present action by Arkla.

Arka's original suit challenging the July 1, 1979 leases was filed in the D.C. District Court on September 21, 1979. Thus Arkla brought its initial action within the ninety-day statutory period. On November 1, 1979, the leases were invalidated by the Secretary. Arkla's original lawsuit later was dismissed without prejudice. *See supra* note 3.

Once the Secretary invalidated TXO's leases, there did not exist a situation adverse to Arkla. Moreover, such a situation did not arise until July 30, 1982 when the D.C. Circuit directed that the leases be reinstated. Consequently, Arkla could not have taken any action contesting these leases during the time between the dismissal of its original suit and the D.C. Circuit ruling. One cannot, after all, challenge something that is nonexistent. With the issuance of the mandate of the D.C. Circuit, there was a judicial order adverse to Arkla. The present action was commenced within a few days thereafter, on August 4, 1982.

[11] "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown Cork & Seal Co. v. Parker,* ..... U.S. ....., ..., 103 S.Ct. 2392, 2396, 76 L.Ed.2d 628, 635 (1983). The Secretary has known since September, 1979 of Arkla's opposition to these leases. Furthermore, Arkla has not slept on its rights. It has acted promptly and has done everything to protect its interests in this matter that reasonably could have been expected of it. We hold that the statute of limitations is not a bar to this action.

Collateral Estoppel

TXO and the Secretary maintain that the validity of the leases has been conclusively determined through litigation in the D.C. District Court and an appeal to the D.C. Circuit. They argue that the present action therefore is precluded under the doctrine of collateral estoppel.

[12,13] In this Circuit, use of collateral estoppel is appropriate when:

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Oldham v. Pritchett, 599 F.2d 274, 279 (8th Cir.1979). We need go no further than the first requirement set forth above.[12] The pivotal issue in the instant action is the validity of a USGS determination that the subject lease property is not within a KGS. This simply was not an issue in the District of Columbia

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[12] The third and fourth requirements also are not met as neither Arkla nor the State of Arkansas was a party or in privity with a party to the prior adjudication so as to afford a full and fair opportunity for them to be heard on the issues presented in this case.

proceedings. *See* 498 F.Supp. at 670-71 n. 1. Therefore, we find the doctrine of collateral estoppel to be inapposite.[13]

Standard for Reviewing the KGS Determination

[14] The Secretary's KGS determination may be set aside if it is arbitrary, capricious, or contrary to law or to the Secretary's regulations. 5 U.S.C. § 706(2)(A). The reviewing court must ascertain if the Secretary's decision was based on a consideration of the relevant factors, and in so doing must conduct a "thorough, probing, in-depth review" of the record. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971).

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[15,16] Appellants correctly point out that when a court reviews agency action, it may not consider evidence outside the administrative record for the purpose of substituting its judgment for that of the agency. But that did not occur here. The district court admitted and used supplementary evidence only to explain the record and to determine the adequacy of the procedures followed and the facts considered by the Secretary in reaching his decision. Some of the testimony considered by the court below was not only proper, but indispensible. For example, the map of the Fort Chaffee area used for KGS determinations by the Tulsa USGS office was not available to the court; if the district court were to review the KGS decision in anything more than a perfunctory, rubberstamp way it had no choice but to review Johnson's deposition and hear testimony from other current and former USGS personnel to determine the methodology used by that office in reaching its decision. As this Court stated in *Independent Meat Packers Association v. Butz,* 526 F.2d 228 (8th Cir.1975), *cert. denied* 424 U.S. 966, 96 S.Ct. 1461, 47 L.Ed.2d 733 (1976):

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[13] Our conclusion is supported by the Supreme Court's recent statement in *Nevada v. United States,* —— U.S. ——, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983): "[collateral estoppel] can be used only to prevent 'relitigation of issues actually litigated' in a prior lawsuit." *Id.* at ——, 103 S.Ct. at 2918, 77 L.Ed.2d at 524 n. 11 (citation omitted).

> [U]nless an inadequate evidentiary development before the agency can be shown *and supplemental information submitted by the agency does not provide an adequate basis for judicial review,* the court in conducting the plenary review mandated by *Overton Park* should limit its inquiry to the administrative record already in existence *supplemented, if necessary, by affidavits, depositions, or other proof of an explanatory nature.*

Id. at 239 (citations omitted, emphasis added).

[17] The district court's admission of explanatory evidence served to help the court understand the complex nature of petroleum geology. It also served the related and equally important purpose of educating the court as to the kinds of scientific, technical, and economic data that are relevant to a legally correct KGS determination. Without supplementary evidence of the kind the district court admitted, the court hardly could be expected intelligently to determine whether the Secretary adequately considered all the factors that go into a proper KGS determination. Both plaintiffs and defendants brought in experts to educate the court and to illuminate the administrative record, not to substitute the court's judgment for the Secretary's. We do not find any error in the scope or methodology of the district court's review of the Secretary's decision.

Validity of the KGS Determination

[18] The Secretary and TXO argue that the lands in question were properly classified as non-KGS. But the Department, in making the KGS determination, did not consider pertinent geologic information that readily was available to it or actual competitive interest that had been shown in the Fort Chaffee area. Instead, the Department made its determination under an arbitrary one-mile stepout rule. These actions ignore Congressional intent in enacting the MLA and are inconsistent with that statute. Therefore, because the Department applied an arbitrary mileage rule without even considering geologic information or competitive interest, we hold that the KGS determination is unlawful.

The Department's treatment of the lease applications in this case brings to mind the legend of the tribesman who sold Manhattan Island for a few trinkets and a small quantity of strong drink. In the words of Lorina Hart,

> Old Peter Minuit had nothing to lose,
> When he bought the Isle of Manhattan
> For twenty-six dollars and a bottle of booze
> And they threw in the Bronx and Staten.[14]

The analogy is not perfect, however, because the Department in this case probably had far more insight into the value of what

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it was selling than did the Indians in their transaction with the Dutch. In spite of a wealth of information available to him, Johnson, an experienced geologist with special knowledge of the Fort Chaffee area, was constrained by the admonitions of his superiors to limit any KGS extension to not more than one mile beyond the section in which the well was located. Thus, he was not free to use the full range of his expertise in making KGS determinations. Instead, he used a method for KGS determinations that was specifically rejected by Congress in response to the protests of the oil industry—an arbitrary mileage system.

Prior to his cancellation of the leases, the Secretary ordered the USGS to conduct a review of the Tulsa USGS office's KGS determination. The result was the Girard report, which thus far has been the only official administrative review of the KGS determination for the TXO leases. D.R. at 392-433. The covering memorandum to the report from the Director of USGS makes the following statement with regard to USGS policy on KGS determinations in the Fort Chaffee area:

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[14] "Give it Back to the Indians," from the musical "Too Many Girls," words by Lorenz Hart, music by Richard Rodgers (Chappell & Co. 1939).

> The history of the oil and gas industry's desires with regard to KGS's is that the Geological Survey define them in a restricted fashion. Consistently, the industry has challenged the Survey as being too liberal in its interpretations, and consistently the courts have supported the existing interpretation. Therefore, in the Fort Chaffee case, the Survey has found itself in a difficult situation. Any layman reviewing production in and around Fort Chaffee would conclude that the Fort Chaffee area is potentially productive. However, for our personnel to have defined the KGS's in any way other than the determination which was made, would have put the Survey and the Department in a position that was open to challenge in the courts.

Id. at 393-94. This statement helps to explain the "criticism" received by Johnson for attempting to make KGS determinations beyond the one-mile stepout. The USGS feared court challenge, but the fear of being sued is no excuse for a failure to implement Congressional intent. The USGS, which by its own admission never has had a KGS determination reversed for being too broad, had every reason to believe that, if challenged, its proper judgment would be sustained. Instead, it bowed to industry pressure by using an arbitrary mileage standard, which surely never would be challenged as being over-inclusive, since the State of Arkansas used it as a minimum spacing unit for producing wells.

A. Congress and the MLA

The MLA, passed in 1920, forms the basis of the Secretary's authority to lease mineral rights on federal lands. Though the MLA originally applied only to lands in the public domain as part of federal sovereignty, it later was extended to cover virtually all lands owned by the federal government. The broad purpose of the MLA was to provide incentives to explore new, unproven oil and gas areas through noncompetitive leasing, while assuring through competitive bidding adequate compensation to the government for leasing in producing areas.

A major controversy in the Congressional hearings arose over where the line should be drawn between competitive and noncompetitive lands. Review of the legislative history of the MLA reveals that several arbitrary mileage rules for identifying lands to be leased competitively were considered but that all were rejected.[15] Oil industry spokespersons protested that these proposals did not comport with the geologic realities of oil fields. They argued that allowing competitive leasing only within known geological structures would truly reflect the way in which oil accumulates underground. Congress accepted

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that argument and the law as enacted provided that competitive leasing would be the rule for lands lying within "known geological structures of producing oil or gas fields." The legislative history of the Act shows that oil industry spokespersons represented and Congress understood that, for purposes of the MLA, the term KGS, though a broad term, basically meant domes and anticlines which contained produc-

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[15] *See* H.R.14094, *reprinted in* Hearing before the House Committee on Public Lands, 63rd Cong., 2d Sess. at pp. 3-4 (1914) (50 miles); H.R.3232, *reprinted in* Hearings before the House Committee on Public Lands, 65th Cong., 2d Sess. at 8 (1918) (10 miles); 56 Cong.Rec. 657 (Jan. 7, 1918) (statement of Senator Kendrick) (20 miles).

ing wells.[16] Given that meaning, a KGS could extend considerably less or considerably more than one mile from a given well, depending on the geology of the area. The legislative history makes it clear that when it enacted the MLA, Congress accepted the factual premise that no arbitrary mileage rule can, other than by sheer chance, define a KGS.

Concededly KGS is a broad term, and the Secretary has authority to determine its meaning. Even so, this authority must operate within the confines of Congressional intent, not to mention common sense. These confines were exceeded when, based on a map nearly void of pertinent information other than one-mile sections around producing wells, the Secretary disposed of valuable public resources at fire sale prices. This was no substitute for the use of proper procedures to determine if the lands to be leased are within a KGS. That an arbitrary mileage rule was used by the Tulsa USGS office as the sole

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[16] *See, e.g.,* 56 Cong.Rec. 657 (Jan. 7, 1918); Hearings before the House Committee on Public Lands on H.R.3232 and S.2812, 65th Cong., 2d Sess. at 131-2, 238-40, 253 (1918).

The Secretary now contends that the Department's regulations limit a KGS to known traps or pools of oil or gas, and that each separate trap or zone of production is a separate KGS. 43 C.F.R. § 3100.0-5(a) (1970). This fairly recent redefinition of the term KGS does not comport with Congressional intent that the term KGS be construed as domes and anticlines. Moreover, even the Department does not always follow this new definition. In *Nola Grace Ptasynski,* 19 I.B.L.A. 125 (March 5, 1975), the Department upheld a USGS determination that all of an area which produced gas from numerous intervals of sand was one KGS, even though each interval was separate. The instant situation is similar to that in *Ptasynski.* Not less than fourteen different levels of producing sands have been identified in or near Fort Chaffee. Four producing wells have been drilled on the Biswell Hill Anticline, which underlies approximately 50 per cent of the leased area. These wells are located on the lower parts of the anticline. Normally such production indicates production on upper parts of the anticline as well. Tr. at 834, 835.

KGS determinant in itself clearly demonstrates that the KGS determination in this case was at odds with the express intent of Congress.

B. Geologic Information

A great deal of geologic information was available in the Tulsa USGS office, including National Gas Policy Act determinations,[17] various relevant technical logs, annual reservoir pressure reports, subsurface structure maps, and cross sections of the Fort Chaffee area. All of this data was kept either at the Tulsa office, the Arkansas Oil and Gas Commission office in Fort Smith, Arkansas or the USGS office in Little Rock. From information at the Tulsa office, it readily could be determined that sixty-one per cent of the drilled sections within or partially within the Fort had commercially producing wells and another twenty-six per cent had shows of gas. There is no indication that any of this information was considered.[18] The map used for the clearlisting decisions contained only well number, production, and depth of producing wells.[19] It contained no

[17] National Gas Policy Act determinations give the production depth and zone of production of each gas well. Tr. at 82. These determinations are made by the Arkansas Oil and Gas Commission for wells within Arkansas, and are used by the Federal Energy Regulatory Commission in setting the price of natural gas from those wells under the Natural Gas Policy Act. 15 U.S.C. §§ 3301-3315.

[18] I.B.L.A. decisions show that the Department often has made much broader use of available drilling and geologic data than was made here. For instance, although Johnson stated that it was his understanding that the USGS followed a national policy of ignoring shows of gas when making KGS determinations, in *Jack J. Bender*, 54 I.B.L.A. 375 (May 19, 1981), a KGS extension based on shows of gas was upheld.

[19] The depth of a producing well merely shows the greatest depth to which the well is drilled. Depth of production indicates each level from which that well produces, regardless of whether it is at the maximum depth of the well or at higher levels.

information

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about depths of production, shows of gas, or height above sea level of the wells.[20]

The Secretary argues that Johnson was an experienced geologist and that his use of the one-mile rule was a result of his familiarity with the geology of Fort Chaffee acquired during his long tenure with the Tulsa office of the USGS. No one disputes Johnson's expertise as a geologist or his familiarity with the Fort Chaffee area. Johnson applied the one-mile rule in this case not because of geological expertise, but because he previously had received criticism from his superiors for attempting to deviate from the rule. Johnson deposition at 62-63, 197. If in fact Johnson had been allowed free rein to use his knowledge in interpreting all the available data, this case may never have arisen. In any event, for the Department to fix the boundaries of a "known *geological* structure" without first considering pertinent geologic information that readily was available to it is plainly inconsistent with the MLA. Equally inconsistent is the Secretary's decision to grant the TXO leases based upon such a KGS determination.

C. Competitive Interest

Perhaps even more serious than the Secretary's failure to make use of the available geologic data and expertise is his failure to consider actual competitive interest in the Fort Chaffee area shown by Arkla and other oil companies. Arkla had made numerous inquiries to BLM about obtaining leases on Fort Chaffee. D.R. at 352-70. Prior to the issuance of the leases in question, Arkla had bid on various drainage leases within Fort Chaffee. In one sale, Arkla's bids of $151.51 per acre on two sections within the Fort were rejected as too low.

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[20] The height above sea level of each well site gives a constant standard against which various wells in a given area can be measured. Such information greatly simplifies the process of correlating data from different wells and levels of production.

These sections were but one section away from the TXO lease area, 562 F.Supp. at 1219-20, which was leased for only $1 per acre.[21] There also was other information available to USGS giving them notice of the considerable interest in the Fort Chaffee lands. D.R. at 1219-22. In light of this, the use of an arbitrary milage system ignores the Congressional intent to promote competitive leasing within known geological structures of producing oil and gas fields.

Furthermore, while the Girard report concludes that the KGS determination was correct "in a legal sense," a thorough reading of the report damns that conclusion with faint praise. In a telling passage, the report notes the failure of the Tulsa USGS office to consider exploration interest:

> [The KGS determination] apparently was made without any consideration of the very unusual circumstances regarding the lands in question. Because the Fort Chaffee Military Reservation has not been available for oil and gas exploration (with the exception of drainage drilling), a normal evolutionary exploration process has not taken place. Through time, the Reservation has become virtually surrounded by producing gas wells. Based on the regional geology, there is a very high probability that many gas discoveries will be made on the lands in question. Noncompetitive leasing was originally designed to stimulate exploration on Federal lands. There was no need to 'stimulate' exploration on the lands in question, because the exploration interest is already there. It would have been more prudent to have called to the attention of higher authority the controversial nature of the lands in question.

Id. at 416-17. Thus, the USGS's own study reveals that competitive interest and risk of exploration were not considered in makig the Fort Chaffee KGS determinations. Because

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[21] In addition, the TXO leases provided for payment of a 12½% royalty on the gross value of any gas actually produced. D.R. at 631-73.

relative risk of exploration and exploration interest lie at the heart of

[734 F.2d 361]

the competitive/noncompetitive leasing dichotomy in the MLA, the failure of the USGS and the Secretary to consider these factors renders the KGS determination unlawful.

Epilogue

The Department eventually took steps to correct the deficiencies in its KGS determination procedures that the Girard Report and subsequent internal reviews revealed. As evidence of this shift, this Court takes judicial notice of BLM Instruction Memorandum No. 84-35 (October 14, 1983)[22] (IM 84-35) which states:

> The simple procedure of taking the spacing unit of the producing well and the adjacent spacing units as a KGS is not sufficient. Although *this procedure* may be a good start, it *does not meet the definition of a KGS either under the intent of the Mineral Leasing Act of 1920, nor does it accord with the established practice prior to the last decade.*

Id. at 1 (emphasis added).

IM 84-35 goes on to outline a procedure for KGS determinations strikingly similar to that advocated by Arkla and mandated by the district court. This procedure calls for consideration of shows of gas or oil, acknowledges that

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[22] Subsequent to the KGS determination at issue here, the Department of the Interior was reorganized. BLM now has the responsibility for making KGS determinations. I.M. 84-35 was called to the attention of the court by the appellees on December 23, 1983, some three months after oral argument. Even though I.M. 84-35 is not part of the record on appeal, the court is fully empowered to take judicial notice of it as it is an order or rule issued by BLM pursuant to its delegated authority. *See New York Indians v. U.S.*, 170 U.S. 1, 32, 18 S.Ct. 531, 539, 42 L.Ed. 927 (1898).

stratigraphically controlled accumulations may be very extensive, states that a closed anticline may be assumed to be presumptively productive, and that a structure may be proven with very few wells. *Id.* at 1-2. IM 84-35 also states that a KGS normally will include *at a minimum* the nine sections surrounding a producing well. As the record in this case reveals, the Tulsa USGA [sic] office only once extended a KGS *beyond* nine sections. *See supra* p. 352.

Conclusions

In short, the Department did not do its homework before it classified the Fort Chaffee lands as non-KGS under an arbitrary mileage rule and granted these leases. These actions were taken without consideration of such "relevant factors," *see Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 416, 91 S.Ct. at 823, as available geologic data and actual competitive interest. Based on our review of the administrative record as amplified and explained by the proceedings in the district court, we hold that these Secretarial actions were unlawful.

The judgment of the district court is affirmed.

JOHN R. GIBSON, Circuit Judge, dissenting.

The court's opinion today has much appeal. It affirms the necessity for competitive bidding for the oil leases in question and will result in substantial income for Arkansas schools. *See* 30 U.S.C. §§ 191, 355. The court, however, paints with too broad a brush, substantially exceeding our proper narrow scope of review, and I must respectfully dissent.

I find it hard to conclude that the district court did anything other than conduct a de novo hearing and substitute its judgment for that of the Secretary. The hearing extended over four days; ten witnesses testified in person and three by deposition. The hearing transcript totaled 837 pages and the deposition testimony totaled 338 pages. The district court in its

order made some eighty findings of fact dealing with the geologic issues. *See Arkla Exploration Co. v. Watt,* 562 F.Supp. 1214, 1218-24 (W.D.Ark.1983) (Findings of Fact 37-113, 119-22). There was testimony and findings of expert opinions contesting the method upon which Johnson clearlisted the leases as being non-KGS.

While the district court finds that there was no rational basis underlying the appli-

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cation of the one-mile rule, its findings of fact ignored the testimony showing that such a rational basis existed. Johnson testified that production in the area was trapped by stratigraphic lenses. Johnson deposition at 20. The area was characterized by usually very small but numerous gas traps. *Id.* at 180-81, 191. Such a geological structure explains the usage of the one-section measure, which is consistent with that adopted by the State of Arkansas. The witness Horton further explained that Johnson's knowledge of the small size of the traps in the area formed the basis for stepping out KGS's on sections in the area. Tr. at 682-84, 745, 746.

The testimony was clear that Johnson had long experience and detailed geological knowledge of the area in question. The court overlooks testimony that this knowledge was utilized in making the conclusion that the one-mile stepout in this particular area was desirable. Nor does the record reflect that Johnson's policy of stepping out one section was totally automatic. If the well was not a good one or had a thin sand, it might be included in the adjacent section. Johnson deposition at 62. If the well had a particular kind of sand or was expected to have high production, it could be expanded to take in all adjacent sections. It would be a judgment call. *Id.* at 195-96.

While the court dismisses the Girard report as damning the determination with faint praise, the report gives further support for the determination. In his letter that accompanied the report

from the USGS Director, the Secretary stated "[i]t is my conclusion that the KGS determinations are appropriate, given our understanding of the geology and the legal definitions that have been operative in making such determinations." D.R. at 392. The report itself states:

> [T]he geological evidences does not indicate that the oil and gas producing zones in Fort Chaffee are primarily structurally controlled, rather the evidence supports the view that oil and gas production is predominantly stratigraphically controlled and that individual reservoirs do not have broad areal extent.

Id. at 393. It further concludes that "[e]xcept as noted above, none of the spacing units (sections) can be tied to a producing well. Therefore, the negative KGS determination was properly made." *Id.* at 416.

All of the foregoing testimony demonstrates that there was a rational basis for the use of the one-mile stepout from each of the posted wells. With such a rational basis, this court should not conclude that the determination was arbitrary and capricious.

The court bases its decision on the failure of the Johnson method to meet the statutory requirement, looking essentially to the legislative history. This history demonstrated, however, that when Congress was considering this statute in 1918 the question was whether an arbitrary distance measure of ten or twenty or fifty miles should be used, or the more general geological description. To say that the rejection by Congress of the ten-mile or longer distance measures makes the present determination contrary to this statute is again to overlook the geological testimony of the small gas traps in this particular area that made the use of the one-mile stepout particularly appropriate.

The opinion of the court today should be compared with *First National Bank of Fayetteville v. Smith*, 508 F.2d 1371 (8th Cir.1974). There we recognized that more than mere error is necessary to meet the test and that administrative action may be regarded as arbitrary and capricious only where it is not supportable on any rational basis. *Id.* at 1376. Further, evidentiary conflicts should be weighed in favor of the administrative action. *Id.* at 1378. In *First National Bank* the district court independently weighed the evidence and decided to give greater weight to the testimony of the protestant's expert and focused exclusively on the testimony most favorable to that view rather than the evidence that would support the finding of the agency. The opinion of the court today in affirming the district court takes the same approach as that taken by the district court and properly reversed in *First National Bank*.

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No. 84-490

In The

Supreme Court of the United States

October Term, 1984

TEXAS OIL & GAS CORPORATION,

Petitioner,

v.

ARKLA EXPLORATION COMPANY,
STATE OF ARKANSAS, and
WILLIAM P. CLARK, Secretary of
the Department of Interior,

Respondents.

On Petition For Writ of Certiorari
to the Eighth Circuit Court of Appeals

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION, ROCKY MOUNTAIN OIL AND GAS ASSOCIATION, AND INDEPENDENT PETROLEUM ASSOCIATION OF MOUNTAIN STATES

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With the written consent of all parties, the Mountain States Legal Foundation (MSLF or Foundation) respectfully submits this brief as amicus curiae on behalf of its members, the members of the Rocky Mountain Oil and Gas Association (RMOGA), and the members of the Independ-

ent Petroleum Association of Mountain States (IPAMS), Amicus has filed the consents of all parties with the Clerk of the Court.

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INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation seeks to protect the vested property rights of its members, including their rights in federal oil and gas leases.

RMOGA is a voluntary, nonprofit association whose purpose is to promote the discovery, development, production, and conservation of oil and gas in the Rocky Mountain region. RMOGA's 600 members are involved in all phases of the oil and gas industry and related businesses. RMOGA is unique in that it represents all facets of the industry from the oil field to the service station.

IPAMS is a voluntary nonprofit association whose purpose is to represent the interests of 1700 independent oil and gas producers in the Rocky Mountain region. Its 1700 members, including producers and related support companies, seek to promote the exploration, development, and production of oil and gas in the mountain states.

The instant case is of particular importance to the members of MSLF, RMOGA, and IPAMS. Each organization has members who have qualified for federal oil and

gas leases under the noncompetitive leasing program by complying with the Mineral Leasing Act of 1920 and the regulations of the Department of Interior for oil and gas lease applications. The Eighth Circuit decision upheld the revocation of leases that were also issued in accordance with the Mineral Leasing Act and the regluations. The court declared the Interior Department's definition of a known geologic structure unlawful, and thus, leases issued using that definition may be subject to challenge.[1] As a result, the members of MSLF, RMOGA, and IPAMS are faced with the possibility that now or in the future the Department of Interior will rely on the *Arkla* decision to review KGS determinations. This uncertainty can have great detrimental effect in an industry that requires great capital outlays and relies on certainty.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Eighth Circuit Court's decision in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984) creates new law by adding market forces, such as competitive interest and exploration risk, to the Department of Interior's sixty year old definition of a known

[1]The Amicus organizations do not believe that the Department of Interior or a third party can legally contest a lease already issued in accordance with the law. However, even the possibility of that action has such serious consequences for the oil and gas industry that the Amicus organizations believe that this Court needs to resolve the issue now in favor of the security of lease title.

geologic structure (KGS).[2] By introducing these factors into the Interior Department's decision of whether the federal lands should be leased competitively, the Eighth Circuit's opinion assumes the role of a judicial legislature and changes what Congress has declined to change. As a result of this judicial change, serious questions are raised as to the status of leases issued under the disapproved definition or as to leases issued thereafter.

In concluding that the Department of Interior's KGS standards conflicted with the Mineral Leasing Act, the Eighth Circuit ignored the fact that the statutory review period of 90 days had long expired before Arkla Exploration Company sought relief in the Arkansas federal courts. This raises two very important questions—whether existing leases can be reviewed under the new KGS criteria and whether future noncompetitive leases are left open to revocation upon a KGS determination. This possibility creates unwelcome uncertainty in lease title that has far reaching consequences for the entire oil and gas industry.

This brief Amicus Curiae will demonstrate how the Eighth Circuit's holding may affect the status of thousands of noncompetitive leases. The administrative uncertainty about lease title will in turn impair the nation's long term efforts to find and develop onshore oil and gas.

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[2]This definition determines whether federal lands are leased on a competitive or noncompetitive basis. The Mineral Leasing Act of 1920 (MLA) provides that federal lands within a geologic structure known to contain oil or gas deposits shall be leased to the highest qualified bidder after competitive bidding. 30 U.S.C. § 226(b) (1982). Federal lands not deemed to be located in a KGS may be leased to the first qualified applicant under the noncompetitive leasing program. 30 U.S.C. § 226(c) (1982).

For more than 60 years, a lessee whose application for a federal lease was accepted could be certain that the lease was his for the statutory term. This security of title is an essential prerequisite for the exploration and development of oil and gas. Without such certainty the lessee will be reluctant to drill wells if he cannot be certain that the lease is his.

This decision comes at a time when energy independence remains an important policy objective of the United States. Noncompetitive leases account for an estimated 75 percent of the onshore lease activity on federal lands. If these leases lose their presumption of validity, the nation may lose potential production and revenues of substantial magnitude. Energy independence played an important role in the formulation of the noncompetitive leasing program in 1920 and has continued to be of paramount importance.[3] Clearly, the effect of the Eighth Circuit decision runs counter to the very law that it purports to uphold.

DISCUSSION OF REASONS FOR GRANTING THE WRIT

A. The Eighth Circuit Decision Rewrote The Definition Of A Known Geologic Structure

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[3]In 1935, Congress repealed the noncompetitive program, but reenacted it in 1946, because the nation's war experience demonstrated a continuing need to stimulate the discovery of new energy reserves and to grant incentives to persons exploring for unproven wells. S. 1236, 79th Cong., 2d Sess., 92 *Cong. Rec.* 9102 (1946).

By Requiring The Interior Department To Consider Competitive Interest And Exploration Risks.

The ruling in *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347 (8th Cir. 1984), stunned the nation's oil and gas industry. Prior to 1983, no court or administrative proceeding had ever held that the agency had to take into account competitive interest or the risks of exploration when defining a KGS.[4] The inconsistencies between what the court held and the agency's definition (which has not been changed over the sixty year period that it has been in use) create doubt about the certainty of title to noncompetitive leases, once they have been formally issued by the Secretary of the Department of Interior.

Specifically, the Eighth Circuit held:

> Perhaps even more serious than the Secretary's failure to make use of the available geologic data and expertise is his failure to consider actual competitive interest in the Fort Chaffee area shown by Arkla and other oil companies.

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[4]None of the cases cited by the Eighth Circuit or the district court support the holding that competitive interest or exploration risks must be considered in deciding whether a given area of land falls within a known geologic structure. *Hepburn T. Armstrong*, 72 IBLA 329 (1983) (holding that "The fact that oil companies active in the area have expressed no interest in the lands at issue does not undermine Survey's KGS designation."); *Nola Grace Ptasynski, Barbara C. Lisco*, 19 IBLA 125 (1975) (affirming the USGS KGS classification despite acknowledged risks and uncertainties of the geology.); *John P. Dever*, 67 Interior Dec. 367 (1960) (quoting the USGS Circular 419 (1959) which only cites physical geologic characteristics as factors to be considered in the KGS determination procedure).

Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d at 360.[5] In attacking the Department of Interior's internal review of the KGS classification, the court further stated:

> Thus, the USGS's own study reveals that competitive interest and risk of exploration were not considered in making the Fort Chaffee KGS determinations. Because relative risk of exploration and exploration interest lie at the heart of the competitive/noncompetitive leasing dichotomy in the MLA, the failure of the USGS and the Secretary to consider these factors renders the KGS determination unlawful.

Id. at 360-61.

A comparison of the above holdings with the actual language of the statute and the regulations demonstrates how far the Eighth Circuit strayed from the legislation in question. Section 17 of the Mineral Leasing Act of 1920 provides in pertinent part:

> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the

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[5]The district court held in part that:

> In making any future KGS determintions, the following factors, among others, need to be considered: the Congressional intent in exploration and development of areas in which the exploration interest is relatively slight and the risk relatively great; the Congressional intent to promote competition in those areas wherein exploration interest is already present and the risks substantially less; . . . in determining and applying the true definition of the term "known geologic structure" consistent with Congressional intent, the clearly expressed Congressional purpose in providing the State of Arkansas and its counties and schools with a "fair" return on the value of the lands and minerals acquired from the State of Arkansas by the federal government, should be considered.

Arkla Exploration Co. v. Watt, 562 F. Supp. 1214, 1227 (W.D. Ark. 1983).

> person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding.

30 U.S.C. § 226(c) (1982).

The regulations follow the legislative language and provide:

> A known geologic structure is technically the trap in which an accumulation of oil or gas has been discovered by drilling and determined to be productive, the limits of which include all acreage that is presumptively productive.

43 C.F.R. § 3100.0-5. (1984).

In conclusion, a review of Section 17 of the MLA demonstrates that the court amended the law by judicial decision making and that Interior's failure to consider such factors as competitive interest or exploration risks is not unreasonable. The statutory phrase "structures known to contain deposits of oil or gas" only refers to the geology of the land in question. The Eighth Circuit's factors concern market forces that are extraneous to the land's geologic characteristics and clearly write new law.

B. The Arkla Decision Could Affect The Lease Title Of Thousands Of Noncompetitive Leases.

Prior to the *Arkla* decision in the Eighth Circuit, once a lease was issued under the MLA and the regulations, it was presumed to be valid. *See Union Oil Co. of California v. Morton,* 512 F.2d 743 (9th Cir. 1975). However, following the *Arkla* decision, there is no such certainty. The court did not merely find that the TXO leases should not

have been issued under the noncompetitive program. Instead, the court held that the agency procedures to define a KGS conflicted with the MLA and that the agency must take into account a number of factors when defining a KGS that heretofore have never been considered, namely exploration risk and competitive interest.

While the court may have believed that such factors are relevant to the noncompetitive leasing program, the fact remains that the court invalidated Department of Interior standards that have been the basis of issuing noncompetitive leases for more than half a century. Since the court held that the agency standards were contrary to the MLA, there is a real possibility that other existing noncompetitive leases may be subject to challenge as having not been leased in accordance with the law.[6] Even if the decision is not applied retroactively, the possibility of future leases not having the certainty that title vests will impair future efforts to find oil and gas.

The impact of the *Arkla* decision on other lessees is amply illustrated by what happened to Texas Oil and Gas Corp. The company fully complied with both the Mineral Leasing Act of 1920 and the regulations of the Department of the Interior in filing applications for noncompeti-

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[6]The Secretary has the power in an administrative proceeding timely initiated to cancel a lease of public lands issued in contravention of the provisions of the Mineral Leasing Act. Until the *Arkla* decision, this power was limited. "We sanction no broader rule than is called for by the exigencies of the general situation and the circumstances of this particular case. We hold only that the Secretary has the power to correct administrative errors of the sort involved here by cancellation of leases in proceedings timely instituted by competing applicants for the same land." *Boesche v. Udall,* 373 U.S. 472, 485 (1963).

tive gas leases on acquired military lands. After more than five years of litigation, the Eighth Circuit held that the leases were issued contrary to the MLA and were therefore properly revoked.

This result clearly falls outside the recognized limits on the cancellation of leases. Arkla Exploration Co. never filed lease applications for the land and allowed its administrative challenge of the lease to lapse. By upholding Arkla's contest, the court opens the door for other lease challenges that do not meet the previously recognized limits on cancellation of noncompetitive leases. 30 U.S.C. § 226-2 (1982). Therefore, the Eighth Circuit has established legal precedent that threatens the possible revocation of other noncompetitive leases issued under similar "defective" KGS classifications. For these reasons, the members of MSLF, RMOGA, and IPAMS are concerned that the rules by which they have done business have been thrown out and that their property rights as federal lessees have been diminished.

C. The Arkla Exploration Co. Decision May Reduce Oil And Gas Exploration And Production.

The noncompetitive lease program for public and acquired lands plays a major role in the exploration and development of domestic reserves of oil and gas. Its health is especially important to the small, independent operator, without the financial resources of the major oil companies to bid for competitive leases. These small operations account for 90% of the "wildcat" drilling aimed at discovering new sources of oil and gas.

An estimated 75% of the federal onshore oil and gas leases are issued under the noncompetitive leasing pro-

gram. During Fiscal Year 1983, a total of 11,469 noncompetitive oil and gas leases affecting 18,247,476 acres of federal land (public domain and acquired lands) were issued by the Bureau of Land Management.[7] As of September 30, 1982 there were a total of 115,389 continuing oil and gas leases (both competitive and noncompetitive) on the public lands[8] and 14,492 continuing oil and gas leases on acquired, military, and other federal lands.[9]

Because the noncompetitive lease program plays a major role in domestic petroleum activity, it also accounts for a substantial part of the nation's onshore petroleum production. From 1950 to 1983, oil production from federal and Indian leases represented 13.2 percent of the total United States production. In 1983 alone, it represented 16.2 percent of that total production.[10]

The noncompetitive program plays an even greater role in gas production totals. From 1950 to 1983, gas production from federal and Indian leases represented 16.9

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[7]The 11,469 noncompetitive leases issued in 1983 fall into the following categories:

Program	*Public Domain*	*Acquired Lands*
Over the Counter	3,165	1,086
Simultaneous (Lottery)	6,020	1,198
Total	9,185	2,284

See U. S. Department of Interior, Bureau of Land Management, *Public Land Statistics 1983,* Table 66 at 124 (April 1983) (hereinafter *Public Land Statistics).*

[8]*See Public Land Statistics,* Table 67 at 126.

[9]*See Public Land Statistics,* Table 69 at 131.

[10]See U.S. Department of Interior, Minerals Management Service, *Mineral Revenues: The 1983 Report on Receipts from Federal and Indian Leases,* Table 25 at 68 (1984) (hereinafter *Mineral Revenues).*

percent to total United States production. In 1983, it represented 30.6 percent of such total production.[11]

The noncompetitive lease program is also a significant source of federal revenues. The Bureau of Land Management receipts for fiscal year 1983 included $908,574,130 from bonuses, rents, and royalties from oil and gas leases. This figure represents 76% of the total revenues to the BLM in 1983.[12] Approximately 75% of those revenues were realized from the noncompetitive program at issue in this case. Thus, any decision that threatens the certainty of title of these noncompetitive leases has the potential of disrupting a significant percent of the present and future oil and gas production.

Despite the current role of the noncompetitive lease program in the development of domestic petroleum reserves, the possibility of a challenge to other noncompetitive leases on the basis of the *Arkla Exploration Co.* decision may discourage future drilling. It is equally possible that a lessee would be reluctant to commit the capital for production, if there are doubts about the lease title. Indeed, Congress recognized long ago that the certainty of lease title was a necessary incentive for the industry to find and develop oil.

Other courts have recognized the importance of upholding the continuing validity of a lease, if it has been

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[11]*See Mineral Revenues,* Table 25 at 68.

[12]*See Public Land Statistics* at 194.

issued in accordance with the law.[13] In *Pan American Petroleum Corp. v. Pierson,* 284 F.2d 649, 655 (10th Cir. 1960), the court stated:

> It is common knowledge that exploration for oil and gas is costly. The drilling of wells requires substantial financial risks and the expense of putting those wells on production and of marketing the product is burdensome. If the continued existence of the granted leasehold estate is dependent upon the fluctuating policies of governmental departments uninhibited by any limitations upon time of action, the value of federal oil and gas leases as a title basis for oil and gas development is greatly diminished if not practically destroyed. No prudent operator would be willing to accept the financial risks if he were subject to ouster because of some administrative decision based upon improper conduct of an assignor occurring at some distant time in the past . . . Certainty of title is an elementary prerequisite for the sound development of any mineral resource.

Id. at 655.

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CONCLUSION

The decision of the Eighth Circuit clearly rewrites the definition of a KGS in the noncompetitive leasing program. By also holding that the Department of Interior's

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[13]The Tenth Circuit in *Pan American Petroleum Corp. v. Pierson,* 284 F.2d 649 (10th Cir. 1960) held that the lease assignee could not lose the lease for fraud perpetrated by the assignor before the lease was assigned. While this Court granted the petition for certiorari in *Boesche v. Udall,* 372 U.S. 472 (1963), to resolve an apparent conflict in the circuits, the holding did not reverse the Tenth Circuit's decision.

definition violated the Mineral Leasing Act of 1920, the decision raises questions about the certainty of lease title for noncompetitive leases that were issued under the disapproved definition and future noncompetitive leases. By making lease title uncertain, this decision will adversely affect a significant segment of the nation's onshore petroleum production and exploration industry. The door has been opened to untimely challenges and future commitments of capital are made risky and will not be expended until this issue is resolved. Therefore, Amicus urges this Court to grant the writ.

Respectfully submitted,

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No. 84-490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS OIL & GAS CORP.,

Petitioner,

v.

ARKLA EXPLORATION COMPANY,
STATE OF ARKANSAS,
WILLIAM P. CLARK, SECRETARY OF THE INTERIOR,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR ARKLA EXPLORATION COMPANY AND THE STATE OF ARKANSAS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether review by writ of certiorari should be granted in this case in which there is no conflict among the circuits because (a) the litigation in the District of Columbia (i) proceeded with the explicit judicial recognition that that litigation excluded any issues dealing with known geological structures (KGS) and (ii) proceeded with the consent of the Petitioner here that KGS issues could be addressed in subsequent litigation after the D.C. Circuit had ruled, and (b) the litigation in the Eighth Circuit was (i) exclusively concerned with the KGS issue and (ii) acquiesced in the entire substance of the D.C. Circuit's ruling on the non-KGS issue?

2. Whether review by writ of certiorari should be granted in this case in which the court below (a) enjoined the Secretary from following a procedure which (i) was inconsistent with the Secretary's prior rulings and (ii) which the Secretary has subsequently conceded was inconsistent with the controlling law, and (b) in which the judgment affirmed below is in any event explictly limited to the specific facts and specific parcel of real estate in controversy?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The list, under the heading "parties", in the Petition for a Writ of Certiorari omits the State of Arkansas, which was a plaintiff in the proceedings before the United States District Court for the Western District of Arkansas and an appellee in the United States Court of Appeals for the Eighth Circuit.

The list in the Petition also omits the State of Alaska, which joined the brief *amicus curiae* before the Eighth Circuit.

Since Rule 21.1(b) only requires a listing of parties "to the proceeding in the court whose judgment is sought to be reviewed," Respondents do not here respond to the reference in the Petition under the heading "parties" which refers to the proceedings in various courts and agencies whose judgments do not appear to be the subject of any petition for review.

Respondent Arkla Exploration Company is a wholly owned subsidiary of Arkla, Inc. which has no subsidiaries nor affiliates (except for wholly owned subsidiaries).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit which is sought to be reviewed here (Pet. App. Ex. 6) is reported at 734 F.2d 347. The Eighth Circuit's denial of petitions for rehearing and suggestion for rehearing en banc, dated July 3, 1984, is unreported. The opinion affirmed the opinions of the United States District Court for the Western District of Arkansas (Pet. App. Ex. 4,5), which were reported at 548 F.Supp. 466 and 562 F.Supp. 1214.

GROUNDS FOR JURISDICTION

Respondents are satisfied with the presentation of the grounds on which jurisdiction of this Court is invoked, as set forth in the Petition.

STATUTES INVOLVED

The pertinent provisions of 30 U.S.C. §§189, 226, and 226-2, and 43 C.F.R. 3100.05(1) are set forth at Pet. 7-8.

In addition, the Administrative Procedure Act, as codified, provides in pertinent part at 5 U.S.C. §702, that:

> Right of Review.
> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

The Administrative Procedure Act, as codified, also provides in pertinent part at 5 U.S.C. §706, that:

> Scope of Review.
> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> * * *
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

> (D) without observance of procedure required by law;
>
> * * *
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the role of prejudicial error.

In addition, the Mineral Leasing Act, as amended, provides in pertinent part at 30 U.S.C.A. §355, that[1]

> Disposition of Receipts.
> ... all receipts derived from leases on lands acquired for military or naval purposes ... shall be paid into the Treasury of the United States and disposed of in the same manner as provided under Section 35 of the Act of February 25, 1920, in the case of receipts from sales, bonuses, royalties, and rentals of the public lands under that Act.

Section 35 of the Act of February 25, 1920 (the Mineral Leasing Act), referred to, is currently found at 30 U.S.C.A. §190, and provides in pertinent part that:

> Disposition of Moneys Received.
> All money received from sales, bonuses, royalties ... and rentals of the public lands ... shall be paid into the Treasury of the United States; 50 percentum thereof shall be paid by the Secretary of the Treasury to the State ... within the boundaries of which the leased lands or deposits are or were located; said moneys paid to any of such States ... to be used by such State and its subdivisions, as the legislature of the State may direct giving priority to those subdivisions of the State socially or economically impacted

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[1] The quoted portion of 30 U.S.C.A. §355 was added by Pub.L. 97-94, 95 Stat. 1205 (Dec. 17, 1981), which provided that it take effect "with respect to leases entered into after January 1, 1981."

by development of minerals leased under this chapter, for (i) planning, (ii) construction and maintenance of public facilities, and (iii) provision of public service. . . .

STATEMENT OF THE CASE

Prior to 1976, the Secretary of the Interior was generally precluded by statute from issuing oil or gas leases on federal lands, such as those at Fort Chaffee Military Reservation, which had been acquired for military purposes. In 1976 the Congress, in the course of amending federal coal mining statutes, removed the prohibition on leasing acquired military lands,[2] although neither the Secretary of the Interior ("the Secretary") nor Arkla Exploration Company ("Arkla") was aware that the congressional action was self-executing, i.e., that lands at Fort Chaffee could be leased prior to publication of new regulations in the Federal Register.[3]

In 1977, Texas Oil & Gas Corp. ("TXO") filed applications for non-competitive, one dollar per acre oil and gas leases on Fort Chaffee lands. Processing of the TXO lease applications was delayed and it was not until June 1979 that the Bureau of Land Management office, doing the paperwork in the suburbs of Washington, D.C., had reached the point where it was necessary to seek the

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[2] Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 94-377, §12, 90 Stat. 1090 (1976) *codified at* 30 U.S.C. §352 (1976).

[3] The Secretary's position is discussed in some detail in *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C. Cir. 1982), *reversing*, *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668 (D.D.C. 1980). The Secretary's lack of awareness was commented on by the District Court in this case. *Arkla Exploration Co.* v. *Watt*, 562 F.Supp. 1214, 1216 (W.D.Ark. 1983).

opinion of the U.S. Geological Survey (now the Minerals Management Service) as to whether or not the lands applied for were within a "known geological structure of a producing oil or gas field", 30 U.S.C. §226, (hereinafter frequently referred to as "KGS"). If the Geological Survey (USGS) found that the lands were *not* within a KGS, they could be leased non-competitively for one dollar per acre. If the USGS concluded that the lands *were* within a KGS, they could *only* be leased competitively, after public announcement had been made of the opportunity to bid. The decision of the USGS was to be made by its Area Geologist in Tulsa, Oklahoma, Mr. Edward L. Johnson.

Because of the long delay while TXO's applications had been processed, TXO requested and was given permission to hand carry the relevant documents from the Bureau of Land Management in Silver Spring, Maryland, to Mr. Johnson in Tulsa. Two TXO executives arrived in Mr. Johnson's office with the documents on the morning of June 29, 1979.

Although Mr. Johnson, as Area Geologist, was responsible for, *inter alia*, federal lands in the State of Arkansas, he was not aware that Congress had changed the statute and was not aware that Fort Chaffee lands were available for leasing. He told the TXO officials that he could not approve their applications for that reason. They pointed out that he was in error. (Johnson dep. 42).[4]

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[4] Mr. Johnson's testimony was received below by deposition taken on September 15, 1982, and is cited here as "Johnson dep." Other record citations are to the record in the district court.

Within the next three and a half hours Mr. Johnson determined that some 33,510 acres applied for did not lie within any KGS and he approved, or "clearlisted", the dollar per acre leasing by applying a rubber stamp to the applications.

The "clearlisting" process by which Mr. Johnson determined whether lands applied for were within or without a KGS was very simple. He held the applications up to a map on the wall of his office. If the lands applied for fell within areas marked as KGS, he would disapprove the application, in whole or in part. If the lands applied for fell outside such areas, he would rubber-stamp his approval and the lands would be eligible for one dollar per acre leasing.

Mr. Johnson's map no longer exists and, as he testified, it was not possible to recreate it for use in this litigation because it could have contained some mistakes. (Johnson dep. 77). But he was able to describe in some detail the system employed in its construction, at least as he understood it.

The map consisted of a standard base map containing no geological features. On the map, a draftsman in his office was supposed to indicate, or "spot," new oil or gas wells. The draftsman, in turn, received her data (well number, production and total depth, Johnson dep. 80) from a commercial reporting service, the Petroleum Information Co. (Johnson dep. 44-48).

At some time after a new well had been spotted, Mr. Johnson would determine whether it indicated the presence of or the need to extend the existing boundaries of a KGS. The procedure he would employ was based on his own personal rule, referred to at the trial as the "one mile rule" because he never went more than one mile

from a section in which a well was located regardless of any geological facts which might suggest otherwise.[5] The map contained none of the geological data which the government officials testified was desirable or even necessary, and it did not contain the current geological data about structural analysis which TXO's own oil and gas law expert told the district court normally would be expected.[6]

The lease applications, after having been rubber-stamped in Tulsa, were then, three and a half hours later, handed back to the TXO executives who carried them back to Maryland. Some days later in July (at a time and on a date as to which there is no record in the Department's files), the leases were signed and back-dated to July 1, 1979. (Holdren dep. 15-19).

Not until after the TXO leases had been issued did the public, including Arkla, become aware of the foregoing. Thereafter, a series of events took place in rapid succession—Arkla filed an administrative Protest with the Department of the Interior on September 17, 1979, and filed suit against the Secretary on September 21, 1979. TXO, fearing that the Secretary might act on Arkla's protest, if not simply on the basis of the growing

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[5] The one mile measure, or "step out", was adopted by Mr. Johnson from a State of Arkansas well-spacing regulation.

[6] Statement to the district court by Craig R. Carver, Esquire, Transcript, Aug. 16, 1982, pp. 84-85. It is at least equally significant that Mr. Johnson's map contained no indication that the Arkansas Oil & Gas Commission had designated most of the lands in issue in this litigation, including, in particular, the Biswell Hill Anticline, as Known Geological Structures in 1968 in correspondence with the U.S. Geological Survey. Arkla Ex. 1-6, Tr. 25-34.

public concern erupting from the apparent give-away of valuable public resources, sued to restrain the Secretary from acting to cancel the leases, and on November 1, 1979, the day TXO filed its action, the Secretary cancelled the leases.[7] These events, in turn, formed the backdrop for *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C.Cir. 1982), *reversing*, *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668 (D.D.C. 1980).

The litigation in the District of Columbia Circuit—both at the trial and appellate level—was characterized by an awareness and general agreement among the parties that the issues raised by TXO in its litigation (i.e., the propriety of the Secretary's cancellation of the TXO leases under his procedural regulations) did not involve the "KGS" issues raised by Arkla (i.e., the issue of whether the land had lawfully been leased on a non-competitive, as opposed to a competitive, basis).

Thus, for example, on July 24, 1980, in the course of a hearing before District Judge Green, counsel for TXO explained that TXO preferred to go ahead with its litigation (challenging the Secretary's cancellation on

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[7] On September 20, 1979, the Secretary requested the U.S. Geological Survey to review Mr. Johnson's KGS determinations. That review, known as the Girard Report, concluded that, while its author was of the opinion that the decision was "correct in a legal sense," (a) more comprehensive use could have been made of the available geological data, (b) the determination was not within "the letter of the law" with respect to lands offsetting producing gas wells, and (c) because of the "very unusual circumstances regarding the lands in question," notably the high degree of exploration interest shown by competitors in the industry, Johnson "would have been more prudent" to have had the determination reviewed in light of the "controversial nature of the lands in question.

Arkla's motion to intervene in TXO's case in the District of Columbia was successfully opposed by TXO.

procedural grounds) and, if TXO could successfully establish its contentions that the Secretary's cancellation order was invalid, only then should the court turn to Arkla's KGS issues. As counsel for TXO argued to the District Court (Tr. 6-7):

> On behalf of the defendant, Texas Oil & Gas, we do not feel that this case, at this point, is moot, the *Arkla* case, because we have substantial confidence that the Court will hold that the Secretary acted improperly in cancelling the leases.
>
> Now, should the Court hold that—with our position, that the leases were improperly cancelled on November 1st, then the *Arkla* suit and the Arkla claims would continue to be, in effect, a lien, a green cloud on our title.
>
> We agree at the present time this case, we feel, should have a lower priority, in the pecking order; probably from a pure logical standpoint, it would be best to ignore the fact that the *Arkla* case was, in fact, filed first, and for the Court and counsel to direct their attention first of all to what we call the *TXO* versus *Andrus* case, which is the suit we filed November 1st, trying to set aside the Secretary's order cancelling the leases.
>
> So it would be our position at this point, at least, with the Court still having retained jurisdiction over the Secretary's action in cancelling the leases, that while the *Arkla* case, perhaps, should be put on the back burner, that it should not be dismissed.

Similarly, counsel for the Secretary agreed to litigate TXO's procedural claims to their ultimate end, and only then turn to Arkla's KGS claims, if the leases were ever to be reinstated in the TXO litigation in the District of Columbia. By written stipulation filed with the District Court on October 10, 1980, in the *Arkla* case, with specific reference to the future of the TXO litigation, counsel for the Secretary, seeking to defer judicial

consideration of Arkla's KGS claims until after final decision on the procedural issues, agreed:

> In the event that the Judgment of this Court of September 25, 1980, in Civil Action No. 79-2976 [the TXO litigation] is finally affirmed by the United States Court of Appeals or by the Supreme Court of the United States, as the case may be, this Civil Action No. 79-2501 [the Arkla litigation] may be dismissed without prejudice.

Thus both counsel for TXO and counsel for the Secretary contemplated, and agreed, that the KGS issues raised by Arkla were distinct from the procedural issues raised by TXO and could appropriately be given judicial consideration *after* TXO's claims had been resolved. Only then, after counsel for both the Secretary and Petitioner TXO had agreed that Arkla's KGS claims could be addressed at a later date, did the district judge, *sua sponte*, dismiss Arkla's case without prejudice.

The courts in the District of Columbia litigation went out of their way to preserve the distinction between TXO's procedural claims (which the courts addressed) and Arkla's KGS claims (which the courts did not address). As the district court stated in its opinion: "although the validity of the United States Geological Survey's determination that the lands on Ft. Chaffee for which plaintiff was granted leases were not within a known geological structure has come under attack both before the agency and before this Court, *that issue is not presented in this litigation.*" *Texas Oil & Gas Corp.* v. *Andrus*, 498 F.Supp. 668, 670-71 n.1 (D.D.C. 1981)(citation omitted, emphasis supplied). Nor was the issue argued before or decided by the D.C. Circuit.

Arkla's interest in these developments was considerable. It had for over a decade been requesting that the

government act to put lands at Fort Chaffee up for oil and gas leases. Arkla's interest stemmed from its position as the principal developer and producer of natural gas in northwest Arkansas, the principal operator of the wells in the vicinity of Fort Chaffee and the single most successful bidder in the competitive sales held for drainage leases on the boundaries of Fort Chaffee (drainage lease were the only exception to the former prohibition against leasing lands acquired for military purposes.)[8] Even as the TXO lease applications were being processed, Arkla was being told by the Department of the Interior that Fort Chaffee lands were not yet available for leasing. Tr. 163-164, 181, 185.

The entire affair, as suggested above, had attracted a considerable degree of public attention, in the course of which a number of members of Congress, including in particular the Arkansas delegation, became aware that the financial receipts from oil and gas leases on acquired military lands—unlike similar leases on public domain lands—were not, under then existing law, shared between the federal Treasury and the State within which the lands were located. This became a matter of more than academic concern when the very first competitive sale of gas leases under the new statute on acquired military lands was held in January 1981. That sale—which took place, as it happens, at Fort Chaffee, on the 24,000 acre parcel immediately adjacent to the lands at issue in the instant case—produced bids in some cases of over four thousand dollars per acre (Tr. 155); the total amount bid was almost forty-three million dollars ($42,983,000), for

[8] A detailed history of Arkla's continuing efforts to obtain competitive leases at Fort Chaffee was admitted at trial in Arkla Ex. 10, Tr. 140-141.

an average price of approximately $1,790.95 per acre.[9] Arkla Ex. 11, Tr. 142-151.

Shortly thereafter, the Arkansas delegations in the Senate and House introduced bills to amend the statute and provide for States to share the revenues. The bills resulted in the statutory enactment, Pub. L. No. 97-94, 95 Stat. 1205 (1981) *codified at* 30 U.S.C.A. §§190,355, set out at pp. 3-4 *supra*. The hearings before both the Senate and the House committees focused on the specific factual situation at Fort Chaffee. Thus, for example, the primary Senate sponsor of the bill, Senator Bumpers, observed in his testimony that:

> Even though this bill will cover all military reservations, the one that immediately comes to mind is *Fort Chaffee, Ark.*, which is only two miles from my home.

Hearings Before the Subcommittee on Energy and Mineral Resources of the Senate Committee on Natural Resources, 97th Cong., 1st Sess. at 4 (1981)(S.859) (emphasis supplied).

Of course, at the time in 1981 that congressional hearings were being held the TXO leases at issue here did not exist—the Secretary had cancelled them in November 1979; the D.C. district court had upheld that cancellation in September, 1980; no appellate action had taken place. Thus, the Deputy Assistant Secretary of the Interior, on behalf of the executive branch of the government, had no hesitation in asking the Congress to

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[9] That average price, applied to the 33,510 acres at issue in the instant case, would produce initial revenues to be shared by the federal Treasury and Arkansas of over sixty million dollars ($60,014,734.50), instead of the $33,510 which Petitioner TXO would have this Court approve.

rely on his categorical assurance that the only leases issued on Fort Chaffee lands were those issued competitively (in the January 1981 competitive lease sale which, as observed earlier, brought some forty-three million dollars for twenty-four thousand acres adjacent to the lands at issue in the present case.) In response to an inquiry from Senator Warner, Deputy Assistant Secretary Russell confirmed this:

> Senator Warner. Is the oil and gas lease sale that occurred this year at Fort Chaffee the first such leasing on the part of the Department of the Interior for acquired land used on military reservations?
>
> Mr. Russell. The Fort Chaffee lease sale brought in $43 million in bonus. *The bill before you today would make retroactive the sharing of revenue for that lease sale. It was the first lease sale on acquired military lands for oil and gas.*

Id. at 15 (emphasis supplied).

Thus, the legislation, which became effective December 17, 1981, was made retroactive to cover leases entered into at any time after January 1, 1981 because of the Department's assurances that the 1981 competitive sale of Fort Chaffee lands was the first sale of any lands acquired for military purposes.

Congress, responding to the position of the Department of the Interior that the *first* lease sale of acquired military lands under the 1976 enactment of the Federal Coal Leasing Amendments Act was the January 1981 competitive offering at Fort Chaffee, made its intention to cover all such lease sales clear beyond any doubt. As Congressman Trible explained, Congress intended to share the proceeds from all sales under the 1976 amendments:

> The 1976 amendments to the Mineral Leasing Act for acquired lands should have included a provision for the sharing of proceeds with State and local governments. H.R. 4591 corrects this omission, and I urge its approval by the House.

127 Cong. Rec. H 8026 (Nov. 4, 1981).

Ultimately, *Texas Oil & Gas Corp.* v. *Andrus*, *supra*, was reversed. *Texas Oil & Gas Corp.* v. *Watt*, 683 F.2d 427 (D.C.Cir. 1982). The mandate of the D.C. Circuit came down on July 30, 1982 and on August 4, 1982 Arkla filed the instant action. Arkansas promptly moved to intervene as a plaintiff and its motion was granted in *Arkla Exploration Co.* v. *Watt*, 548 F.Supp. 466 (W.D.Ark.) on September 20, 1982.[10]

Following trial in the western district of Arkansas, final judgment was rendered at 562 F.Supp. 1214 on April 19, 1983. The decision was appealed; argument was heard before the Eighth Circuit on September 15, 1983.

Following appellate argument, the Department of the Interior finally addressed in a direct, unambiguous fashion the practice, described earlier at pp. 6-7, of Mr. Johnson when he stepped out at most a one-mile section from producing wells to determine KGS boundaries in order to clearlist the TXO application. In BLM Instruction Memorandum No. 84-35 (October 14, 1983)(Appendix A), the Department emphatically declared:

> The simple procedure of taking the spacing unit of the producing well and the adjacent spacing units as

[10] In addition to the KGS issues, Arkansas' complaint raised claims as to the State's ownership of some of the mineral interests at Fort Chaffee which the Secretary had purported to lease to TXO. Arkansas' title claims have been deferred pending final disposition of this present action.

> a KGS is not sufficient. Although this procedure may be a good start, it does not meet the definition of a KGS either under the intent of the Mineral Leasing Act of 1920, nor does it accord with established practice prior to the last decade.

On May 7, 1984, the Eighth Circuit affirmed the judgment of the western district of Arkansas. 734 F.2d 347. The Secretary of the Interior has not sought review of that decision in this Court.

ARGUMENT

1. No Conflict Exists Between the Decision of the D.C. Circuit and the Decision of the Eighth Circuit.

It should not be suprising when petitioners seek to persuade this Court to grant certiorari by invoking one of the grounds stated in Rule 17, especially when the alleged ground is a conflict in the circuits. Sup. Ct. R. 17.1(a). Not only is the existence of a conflict one of the most frequent reasons for granting certiorari, it also underscores the importance of maintaining uniformity in the resolution of important issues of federal law.

What is suprising, however, is that Rule 17.1(a) has been invoked by the Petitioner in this case. In order to bring this case within the purview of Rule 17, the Petitioner has manufactured a "conflict" between the decisions of the D.C. Circuit and the Eighth Circuit that is neither apparent nor real.

As noted in the Statement of the Case, the issue before the D.C. Circuit in *Texas Oil & Gas Corp.* v. *Watt* was whether the Secretary of Interior had the power to cancel leases for lands acquired for military purposes which Congress had subsequently opened for leasing by statute. The D.C. Court held that the mandate of the

Federal Coal Leasing Amendments Act of 1975 was self-executing, and therefore, the Secretary could not cancel the leases *on the ground that the lands in question were not open for leasing* under the Department's unrevised regulations prohibiting leasing of acquired military lands.

Neither the District Court nor the Eighth Circuit in *Arkla Exploration Co.* v. *Watt* considered the issue of whether the Federal Coal Leasing Amendments Act of 1975 repealed the regulatory prohibition on the leasing of acquired military lands. Not only was the issue not presented to those courts, but also both courts assumed the validity of the D.C. Circuit's decision. See 548 F.Supp. at 469 (Pet. App. Ex. 4 at 8); 562 F.Supp. at 1216 (Pet. App. Ex. 5 at 5); 734 F.2d at 350 (Pet. App. Ex. 6 at 8). Rather, the question before those courts was whether, assuming that the Fort Chaffee lands were open for leasing, the geological character of the lands was arbitrarily and capriciously classified as non-KGS by the Department of Interior under the Mineral Leasing Act of 1920 and departmental regulations and prior practice.

Thus the two cases involved completely different and unrelated issues under completely different and unrelated regulatory and statutory provisions. The only similarity between the two cases is that they involved the leases for Fort Chaffee lands.

Rather than constituting a case of "conflict" under Rule 17(a), the Court here is faced with a situation similar to that in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387 (1923). In *Layne & Bowler*, both the fifth and ninth circuits had rendered decisions in different cases alleging infringements of the same patent. As to the 20th claim under the patent, the fifth circuit

held that the device at issue did infringe and the ninth circuit found that the specific device before it did not infringe. Certiorari was initially granted on the basis of a conflict in the circuits. Upon closer inspection of the decisions, however, the Court found that, although the two circuits did reach different ultimate conclusions as to infringement on the 20th claim, their conclusions were based upon different devices, and, more importantly, different issues of law and fact. Chief Justice Taft, writing for a unanimous Court in dismissing the petition as improvidently granted, stated:

> It is manifest from this review of the conclusions in the two circuits ... that they were really in harmony, and not in conflict, and that there was no ground for allowing the writ of certiorari to add to an already burdened docket. If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving *principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeals.* The present case certainly comes under neither head.

261 U.S. at 392-292 (emphasis supplied)

Like the situation in *Layne & Powler*, this case involves different legal issues as applied to different factual circumstances. *Texas Oil & Gas Corp.* v. *Watt* involved whether the Secretary, given the Federal Coal Leasing Amendments Act, could cancel leases applied for and issued prior to revision of the regulatory prohibition on

leasing acquired military lands. *Arkla Exploration Co.* v. *Watt* involved whether it was arbitrary and capricious under the Mineral Leasing Act and departmental policy to determine the geological character of land available for leasing by making mileage measurements from producing wells. In fact the lack of a conflict in this case is even more apparent than in *Layne & Bowler.* Here, even the ultimate conclusions of the two court of appeals' decisions do not conflict.

Petitioner argues that the Secretary of Interior, by virtue of the decisions of the two courts of appeals, is faced with inconsistent mandates. How this supposed quandry faced by the Secretary of Interior affects Petitioner, a private oil and gas corporation, is difficult to fathom. Yet, assuming petitioner can legitimately raise this issue, it is pertinent that the Secretary is not seeking certiorari and, thus, presumably does not feel threatened with "conflicting" responsibilities. The Secretary's silence with regard to the two decisions is most probably due to the fact that "conflicting" mandates do not exist. Because the issue was not before it, the D.C. Circuit proceeded to resolve the cancellation issue *on the assumption* that the Fort Chaffee lands were not within a known geological structure and thus available for non-competitive bid. The district court in the District of Columbia explicitly noted that it was not deciding that issue. 498 F.Supp. 668, 671 n.1. The Eighth Circuit held that the process used by the Department of Interior in classifying the lands as non-KGS was arbitrary and ordered the Secretary to evaluate the geological character of the lands. If after that review the lands or a portion thereof are legitimately classified as non-KGS, Petitioner, per the D.C. Circuit's decision, may be entitled to the non-competitive leases because it was the

first to file. This would be the case even if the leases had been reissued before the Eighth Circuit decision. The Secretary still retains the power to cancel leases that have not been issued in accordance with law. This latter power includes the power to cancel leases because of an incorrect KGS determination. "If an offer which should be rejected in whole or in part is not rejected, and a lease is issued covering lands determined to be within a known geological structure after the determination, the lease is subject to cancellation as to those lands." Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 Rocky Mtn. L. Inst. 589, 634 (1983). Thus, not only did the issues differ in the two circuits, but also the conclusions are in harmony.

The Petitioner attempts to buttress its claim of "conflict" by asserting that the Eighth Circuit sat in review of the D.C. Circuit decision. This argument rests on an assumption not based in fact. What Petitioner assumes is that the D.C. Circuit, by holding that the Federal Coal Leasing Amendments Act made acquired military lands available for leasing, also *sub silentio* decided that the lands in issue were not within a known geological structure. Nowhere in the D.C. Court's decision is the latter issue considered or resolved. In effect, by illegitmately stretching the effect of the D.C. Court's decision, the Petitioner in actuality has accused that court of an abuse of the review power, rather than establishing, as it attempts, that the Eighth Circuit overreached its authority. It is an elementary proposition of appellate review that a court does not reach out to answer issues not presented to it for review or issues, as in this case, which were in no way involved or raised in the lawsuit under review by the D.C. Circuit.

A close inspection of Petitioner's argument in this regard indicates that it is based upon the dictionary interpretation of one word, "supersede", in the Eighth Circuit decision. Besides Petitioner's overbroad reading of the D.C. Circuit's decision, it is useful to note that in the ordinary course of leasing federal mineral lands, a KGS determination is made prior to lease issuance. If the KGS determination in this case had been properly made or the D.C. district court had reached the merits of Arkla's lawsuit first, Petitioner's argument would evaporate. Petitioner should not now be permitted to seize on the fortuity of the timing of two separate litigations involving different issues—of which it was continuously aware—to construct a semantical abuse of review argument.

Even assuming that under a strained analysis and dictionary approach to reading the two court of appeals' decisions some sort of ephemeral conflict can be conjured, the "conflict" is so tied to the unique factual circumstances that surrounded the two lawsuits that it is unlikely—in fact, improbable—that the "conflict" will at all affect the course of federal court decisionmaking either on the review of KGS determinations or on Secretarial power under recently enacted statutes. In fact the only way this "conflict" could affect subsequent decisions is if by some trick of history an identical pattern of factual and procedural events recurred.

2. The Eighth Circuit Closely Followed the Well-settled Interpretation of the Statute and the Department's Own Prior Interpretation of the Statute.

The Petitioner asserts that the Eighth Circuit's decision invalidates "a regulation describing administrative procedures in use for over 50 years. . . ." Pet. at 14.

Through a misreading of the Eighth Circuit decision, the petitioner seeks to persuade this Court to review an issue that in no way formed the basis of the Eighth Circuit's decision. In other words, petitioner seeks to obtain review on the basis of what it views as ill-advised dicta. See, e.g. *Keller* v. *Adams-Campbell Co.*, 264 U.S. 314 (1923)(certiorari dismissed as improvidently granted because issue presented based on dicta).

Although both the district court and the Eighth Circuit stated that the Department's regulatory definition of KGS as a "trap" appeared to be inconsistent with Congressional intent,[11] their statements to that effect did not constitute the reason underlying their invalidation of the KGS determination made for the Fort Chaffee lands. Rather than striking down the Department's regulations, the courts proceeded on the much narrower basis that the particular KGS determinations made for the specific Fort Chaffee lands under the regulations were arbitrary and capricious.

On this latter, narrower issue, the courts were undoubtedly correct. As described in the Statement of the Case, the KGS determination was made by a USGS employee, Mr. Edward L. Johnson, who merely went to a map on his office wall, pin-pointed an existing well and sometimes designated the one-mile sections surrounding the well as KGS. He would then compare the lease with the lines on the map, and rubberstamp his determination. This perfunctory process of determining the geological character of federal lands was not based on technical expertise or geological data. Rather, it was

[11] 734 F.2d at 359 (Pet. App. Ex. 6 at 26), 562 F.Supp. at 1225 (Pet. App. Ex. 5 at 26).

based upon the fact that Mr. Johnson once "had been criticized" by a superior for going beyond one mile. (Johnson dep. 197).

The capriciousness of the process employed by Mr. Johnson in determining the KGS status of the Fort Chaffee lands was exacerbated by the fact that the mileage system employed was directly contrary to the legislative intent behind adoption of the KGS language. Even a cursory review of the legislative history leading up to the enactment of the Mineral Leasing Act reveals that Congress emphatically rejected a mileage-based system for determining KGS in favor of one based on the geology of the land.[12]

The Petitioner further argues that the Eighth Circuit's affirmance of the District Court's judgment imposes on the Department of Interior a burdensome procedure for

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[12] In the years leading up to the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. §181 *et seq.*, Congress extensively considered two different methods for distinguishing between valuable and high risk lands. One was to determine the boundary by miles, variously proposed at 50, 20 and 10 miles. See, H.R. 14094 *reprinted in* Hearings Before the House Committee on Public Lands, 63rd Cong. 2d Sess. at pp. 3-4 (1914) (50 miles); H.R. 3232 *reprinted in* Hearings before the House Committee on Public Lands, 65th Cong., 2d Sess. at p. 8 (1918)(10 miles); 56 Cong. Rec. 657 (Jan. 7, 1918) (20 miles; Statement of Senator Kendrick). The second alternative was to authorize the Secretary to make such determinations on the basis of geological structures. The latter alternative was adopted specifically because the "mileage" system was viewed not only as arbitrary but also because it was viewed as contrary to Congress' desire to foster incentive exploration in high risk areas. See Hearings before the House Committee on Public Lands on H.R. 3232 and S.2912, 65th Cong., 2d Sess. at 131-132, 238-240, 350-351 (1918); 56 Cong. Rec. 642, 657 (Jan. 7, 1918); 56 Cong. Rec. 7052 (May 24, 1918).

determining the KGS status of the Fort Chaffee lands. Yet again, Petitioner, on behalf of the Department, is objecting to a judgment that has not compelled the Secretary to seek review from this Court. In fact, the Secretary has recently issued a guideline implementing the suggestions of the District Court, and condemning the process for determining KGS used in this case as contrary to Congressional intent. (Appendix A).

Petitioner's argument, in this regard, is also based on a misreading of the lower courts' judgments. The district court, in sum, has merely required the Department of the Interior to consider all the available geological data before categorizing lands as KGS or non-KGS—a mandate which, as indicated above, is in compliance with Congressional intent.

Petitioner attempts to obfuscate what the lower courts required by pointing its finger at a list of geological data that the District Court ordered the Secretary to consider in determining the KGS status of only the Fort Chaffee lands. However, in so doing, Petitioner fails to inform the Court of the factual background for the list. That list does not constitute set-in-stone criteria that the Department must follow in every KGS determination. Rather, it represents specific data pertaining to the geology of the specific Fort Chaffee lands; data which the evidence established was clearly available to the employee who made the KGS determination, but who shunned it in favor of a simple mileage-based process. Contrary to the claims of Petitioner, the Department has continuously required that such data be considered when available as to a particular parcel of land. See U.S. Department of the Interior, Geological Survey,Circular 419, *The*

Definition of Known Geologic Structures of Producing Oil and Gas Fields (1958)(Ad Rec. #1). See also e.g. *John P. Dever*, 67 I.D. 367 (1960)(relying on Circular 419 to support policy of USGS that "the procedure [of Circular 419] demonstrated why most [KGS] determinations must be made without maps"). Thus, the courts did not cast aside departmental policies, regulations or rules. Rather, the lower courts merely told the Department to follow its own historic practice.

Both Petitioner and amicus also condemn the lower courts for requiring the Department to consider the exploration or competitive interest in lands before leasing. Rather than being innovative, however, the courts were again merely requiring the Secretary to follow in the case of Fort Chaffee lands, a process followed by the Department with regard to other public lands. See e.g. *Mark J. Davis, Jr.* 59 I.D. 65 (1945); *John F. Richardson and Charles F. Consaul*, 56 I.D. 354 (1938); *Practice Applicable to the Issuance of Oil and Gas Prospecting Permits and Extensions of Time for Compliance with Drilling Procedures*, 50 I.D. 546 (1924); *Wilmer Jeanette*, 47 I.D. 582 (1920). In fact, the administrative record in this case indicates that the KGS determination at issue was criticized by the person appointed by the Secretary to review it for the failure to consider the substantial exploration interest in leasing Fort Chaffee lands. (Ad. Rec. 13a).

Consideration of exploration interest is also clearly confirmed by the legislative history. The very reason that Congress chose a non-competitive bidding system for lands outside a KGS was because it would stimulate exploration of high risk territory. For lands within a

KGS, Congress felt that no such stimulation was necessary and accordingly instituted a competitive system in order to realize the highest return for the public. See e.g. Hearings Before the House Committee on Public Lands, 63rd Cong., 2d Sess. at p. 61 (1914); 58 Cong. Rec. 4113 (Aug. 21, 1919).[13] This intent was confirmed as recently as 1979 in the Department of Energy Organization Act.[14]

Petitioner and amicus, however, would condemn the lower courts for looking at "65 year old" legislative history as an exercise in "judicial legislation." Pet. at 17; Brief Amicus Curiae at 7-8. Under their approach, the courts should always confine the interpretation of Congressional statutes exclusively to the "plain meaning" of the words, no matter how ambiguous those words may be. Thus, Petitioner and amicus suggest that the courts

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[13] Contrary to the suggestions of Petitioner and amicus, the fact that an "incentive" or exploration interest underlies the mandate of §17 of the Mineral Leasing Act, 30 U.S.C. §226, has been well recognized by the Courts. See *Atlantic Richfield* v. *Hickel*, 303 F.Supp. 724 (D.Wyo. 1969) *aff'd.*, 432 F.2d 587 (10th Cir. 1970); *California* v. *Udall*, 296 F.2d 384 (D.C.Cir. 1961); *Mountain States Legal Foundation* v. *Watt*, 499 F.Supp. 383 (D.Wyo. 1980).

[14] 42 U.S.C. §7101 *et seq.* Sec. 7112 specifically provides that:

> . . . It is the purpose of this chapter—
>
> * * * *
>
> (12) to foster and assure competition among parties engaged in the supply of energy and fuels. . . .

The above is in line with the fact that from the very beginning of federal leasing under the Mineral Leasing Act, Congress has taken the position that one of the purposes of the Act was "to insure competition". H.Rep. No. 563, 65th Cong., 2d Sess. at p. 13 (May 14, 1918).

abandon a historic method of statutory interpretation[15] for one whereby courts are confined to determining the meaning of ambiguous terms without resort to any of the available aids. In other words, the courts will, unaided, give substance to Congress' words. The approach that more nearly constitutes "judicial legislation" is obvious.

3. The Decision in No Way Clouds Titles

Raising the dreaded hobgoblin of floodgate litigation, Petitioner contends that the effect of the Eighth Circuit decision will result in continuous contests over the leasing of public lands and jeopardize the title to lands already leased. Again, Petitioner has not only overstated its argument, but it has overstated both the history and the impact of this litigation.

Underlying the overdramatic verbiage of Petitioner's argument are two basic concerns: (1) that security of title is threatened by subsequent cancellation by the Secretary or the courts, and (2) that the Eighth Circuit's decision dispenses with the 90 day statute of limitations.

The first concern is easily addressed. The Secretary has always had the right to cancel leases for a variety of reasons,[16] including incorrect KGS determinations.[17] The manner by which the Secretary exercises that power is

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[15] See, e.g. *Teamsters* v. *Daniel*, 439 U.S. 551, 565-66 (1979); *Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 157 (1972); *Harrison* v. *Northern Trust Co.*, 317 U.S. 476 (1942).

[16] See, e.g. U.S. §§183, 184(h)(i), 188.

[17] E.g. *Robert B. Ferguson*, 9 IBLA 275 (1973)(cancellation of non-competitive lease issued 5 years earlier because of incorrect KGS determination). See also Ekberg, *Federal Oil and Gas Leasing: Developments in Selected Problems and Issues*, 29 Rocky Mtn. L. Inst. 589, 684 (1983).

certainly subject to judicial review.[18] To the extent that this long-standing power has caused panic in the industry over title to leases, its concerns are better addressed to Congress.

The Petitioner's statute of limitations concern is equally overinflated. The Eighth Circuit did not portend to dispense with the 90 day statute of limitations in 30 U.S.C. §226-2. That statute was applied even in this unusual case of lengthy, complicated litigation where all relevant parties were aware of the contested issues in each lawsuit from the very beginning.

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[18] As the district court noted it has been held repeatedly that courts can review decisions of the Department of Interior under the Administrative Procedure Act, 5 U.S.C. §§702, 706. 548 F.Supp. at 472 (Pet. App. Ex. 4 at 15). This is clearly in line with this Court's statements to the effect that there is a presumption in favor of review. E.g. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

Petitioner contends that there exists no cause of action or review power because (1) no private rights of action exist under the Mineral Leasing Act and (2) KGS determinations are committed to agency discretion.

With regard to the former claim, 30 U.S.C. §226-2 clearly contemplates judicial review. The cases relied upon by Petitioner (Pet. at 21-22), as the Eighth Circuit correctly noted, involved private rights of action for damages against private defendants and not judicial review of an agency decision. 734 F.2d at 354 (Pet. App. Ex. 6 at 17).

In support of its latter claim, petitioner cites two cases decided prior to the APA. See 734 F.2d at 355n11 (Pet. App. Ex. 6 at 18n11). It also refers to one ambiguous comment by a congressman in the legislative history. Pet. at 16. "The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent." *Abbott Laboratories*, 387 U.S. at 141 *quoting* Jaffe, Judicial Control of Administrative Action at 357 (1965).

Petitioner attempts to suggest otherwise by ignoring the procedural and factual history of this lengthy litigation. When Arkla first filed suit on September 21, 1979, there was conceded compliance with the statute of limitations (the leases were executed as of July 1, 1979). Yet, after that suit was filed, the Secretary cancelled Petitioner's leases. After that action was taken, as the Eighth Circuit correctly noted, "there did not exist a situation adverse to Arkla." 734 F.2d at 356 (Pet. App. Ex. 6 at 20). Under both §226-2 and the APA, 5 U.S.C. §702, an *adverse* final decision is necessary in order to trigger the ability to sue and the statute of limitations. See, e.g. *Western Electric Co.* v. *Burlington Truck Lines*, 501 F.2d 928, 935-936 (8th Cir. 1974). This latter situation existed for Arkla until the D.C. Court of Appeals on July 30, 1982 reversed the Secretary's cancellation order and transmitted notice to the District Court of its action. Arkla again filed suit 4 days later.

Even under generally accepted equitable principles, the Eighth Circuit's decision was far from novel and clearly correct. "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights." *Crown Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 76 L.Ed. 2d 628, 635 (1983). At every turn, Arkla diligently pursued its claims. Petitioner, during the entire period of this litigation, was on notice of Arkla's claims that the leases were unlawful. In fact, counsel for Petitioner admitted before the D.C. district court that even if it ultimately succeeded in *Texas Oil & Gas Corp.* v. *Watt*, further hearings would be appropriate on Arkla's KGS claims. See *supra* pp. 8-9.

The suit by the State of Arkansas also clearly was within the letter and spirit of 30 U.S.C. §226-2. Arkansas

was not granted any interest in the proceeds from military lands until January 1, 1981. 30 U.S.C. §355. See also discussion, *supra* pp. 11-14. The impetus for the Act of Congress was specifically due to the leasing controversy surrounding the Fort Chaffee lands. Yet, at the time that statute was passed, Petitioner's leases had been cancelled and that action had been upheld by the D.C. District Court. In fact, Congress proceeded on the assumption that Petitioner's leases were cancelled. Thus, Arkansas was not injured by the erroneous KGS determination which deprived it of substantial revenues until the date of the D.C. Court of Appeals decision. Like Arkla, there existed no outstanding order adverse to the interests of the State of Arkansas. Arkansas filed suit on August 18, 1983 and, therefore, filed well within the 90 day period.

Petitioner's concern that the Eighth Circuit's decision means that states will not be bound by the limitations period is therefore in error. Not only was Arkansas' suit timely filed, but also, given the unique set of facts and surrounding circumstances presented by this litigation, a situation like that faced by Arkansas will never recur.

CONCLUSION

The decision below did not give rise to any conflict among the circuits; nor did it strike down an agency regulation. The decision below merely applied long-standing rules of law and administrative practice. In addition to complying with the law, the decision was fair and represented sound, congressionally recognized public policy. The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240

October 14, 1983

Instruction Memorandum No 84-35
Expires 9/30/84

To: All State Directors

From: Director

Subject: Procedures for Delineating the Area to be Included Within Known Geological Structures of Oil and Gas Fields

A known geologic structure of a producing oil or gas field is defined as "the trap, whether structural or stratigraphic, in which an accumulation of oil or gas has taken place. The limits of such structure according to Geological Survey Circular 419 include all acreage that is presumptively productive". In the Geological Survey Circular 419, it is stated: "On April 16, 1936, a decision by the Secretary of the Interior (Columbus C. Mabry, 55 I.D. 530) held (syllabus):

> The defining of the boundaries of the geologic structures of producing oil and gas fields, under authority of section 32 of the Leasing Act, is for administrative purposes and is not a guaranty of geologic character. Accordingly, such boundaries are not to be taken as absolutely and accurately showing the extent in each instance of the geological structure producing oil or gas, but they may later be extended or reduced to accord with the facts.
>
> This premise recognizes that structural traps or "known geologic structures' can be more extensive

than the pools of oil or gas they may contain. Known geologic structure definitions are made after evaluation of all controlling fractures, and such definitions are made conformable to the dominant structural feature involved."

Due to the priority of other programs, it has not been possible to dedicate.sufficient personnel to make KGSs based on extensive geologic interpretation. The simple procedure of taking the spacing unit of the producing well and the adjacent spacing units as a KGS is not sufficient. Although this procedure may be a good start, it does not meet the definition of a KGS either under the intent of the Mineral Leasing Act of 1920, nor does it accord with established practice prior to the last decade.

The following procedure should now be followed in determining the extent of a KGS:

1. Have current maps available or construct maps showing location of wells and their status, distribution of Federal lands, structure on one or more key productive horizons, and oil or gas water contacts where know.
2. For structurally controlled accumulations, the boundary of the KGS is made concordant with a contour somewhat below the oil-water or gas-water interface, but not below the spill point of the trap. If an oil or gas water contact is not known, a closed structure such as an anticline or fault trap may be assumed to be presumptively productive to the spill point, and the KGS should be determined by the lowest known closing contour. Complex traps exhibiting both structural and stratigraphic control should be treated in the same way if it can be resonably inferred that the stratigraphic conditions necessary for entrapment occur throughout the structure under consideration. It should be noted that this type of KGS may be fully defined very early in the exploration

process. Prudhoe Bay, the largest oil field in America was fully defined and its resources were calculated using geophysical maps and the first three wildcat wells.

3. For stratigraphically controlled accumulations occuring with no structural closure rely first on the geological interpretation of the nature of the trap. A pinchout of a major sandstone such as the Woodbine of East Texas can be demonstrated to be very extensive with very few drill holes.In some areas, geological setions occur in which small porous sand bodies are found which contain gas or oil on a very predictable basis such as in the Green River Basin of Utah, Delaware Basin of New Mexico, and certain areas in Wyoming. These areas should be delineated on the basic net pay, net sandstone or other applicable map. It should be noted that these areas may be large, sometimes covering many townships.
4. As a general rule, the minimum size for a new KGS is the spacing unit and the surrounding spacing units, unless there is good geologic reason that one or more of those units have no potential for oil production, such as occurring on an upthrown block of granite.
5. All participating areas must be included in KGS.
6. All shows and reservoirs left behind pipe must be considered in KGS determinations.

Further reference on KGS determinations which should be available to all personnel working on them include:

The Definition of Known Geologic Structures of Producing Oil and Gas Fields, U.S. Geological Survey Circular 419 (1959), Emmett A. Finley

Branch of Mineral Classification Handbook of Instructions, U.S. Geological Survey (1960) Chapter V—Classifications—Oil and Gas Classification, Known Geologic Structure, pp. 120-128.

Geological Survey—Conservation Division Manaul, Chapter 3—Known Geologic Structure (KGS) Determinations, Part 620.3.1 (1980)

Hillary Orden will be contacting a number of you to set up meeting with your appropriate minerals personnel during the week of October 17. At the meeting Hillary and others from this office will field any questions on these procedures and discuss any necessary personnel re-allocation to accomplish the task. He will also discuss the necessary clearlisting process and procedures to which you will be required to certify.

For further information, please call Gary Horton (653-2269) or Robert Schrott (653-2279).

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CLERK

No. 84-490

In the Supreme Court of the United States

OCTOBER TERM, 1984

TEXAS OIL AND GAS CORP., PETITIONER

v.

ARKLA EXPLORATION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary's determination, pursuant to Section 17 of the Mineral Leasing Act, that certain lands within Fort Chaffee, Arkansas, were not "within any known geological structure of a producing oil and gas field," and accordingly are available for noncompetitive leasing, was arbitrary and capricious.

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BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. Exh. 6) is reported at 734 F.2d 347. The opinions of the district court (Pet. App. Exhs. 4 and 5) are reported at 548 F. Supp. 466 and 562 F. Supp. 1214.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1984. An order denying petitions for rehearing was entered on July 3, 1984. The petition for a writ of certiorari was filed on September 27,

1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. 226, provides in relevant part:

> (a) All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.
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> (b)(1) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations in units of not more than six hundred and forty acres, which shall be as nearly compact in form as possible, upon the payment by the lessee of such bonus as may be accepted by the Secretary and of such royalty as may be fixed in the lease, which shall be not less than 12½ per centum in amount or value of the production removed or sold from the lease.
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> (c) If the lands to be leased are not subject to leasing under subsection (b) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease.

STATEMENT

1. Section 17 of the Mineral Leasing Act of 1920 (MLA), 30 U.S.C. 226, authorizes the Secretary of

the Interior to lease federal lands "known or believed to contain oil or gas deposits * * *." Federal oil and gas leases are divided into two classes, popularly known as "competitive leases" and "noncompetitive leases." Section 17(b)(1) of the MLA, 30 U.S.C. 226(b)(1), provides that "[i]f the lands to be leased are within any known geological structure of a producing oil and gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *." In contrast, Section 17(c), 30 U.S.C. 226(c), provides that "[i]f the lands to be leased are not subject to leasing under subsection (b) of this section the person first making application for the lease * * * shall be entitled to a lease without competitive bidding."

Section 32 of the MLA, 30 U.S.C. 189, authorizes the Secretary to prescribe rules and regulations and to take other actions to carry out the purposes of the Act, including, specifically, "to fix and determine the boundary of any structure, or oil or gas field, for the purposes of this Act." Accordingly, the question whether given lands that the Secretary of the Interior has decided to lease should be leased competitively or noncompetitively turns on whether the lands are determined by the Secretary to lie within a known geological structure of a producing oil and gas field (KGS).[1]

2. Prior to 1976, Congress had not provided any statutory authorization for mineral leasing on military lands that had been purchased or otherwise ac-

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[1] While the MLA authorizes the Secretary to issue oil and gas leases, it does not require him to do so. The Act "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall* v. *Tallman*, 380 U.S. 1, 4 (1965).

quired from private owners (rather than reserved from the public domain). By enactment of Section 12 of the Federal Coal Leasing Amendments Act of 1975, Pub. L. No. 95-554, 90 Stat. 1090, however, Congress authorized the Secretary of the Interior to issue mineral leases, under the provisions of the MLA, for acquired lands located within military bases.[2]

In May 1977, petitioner filed applications for 38 noncompetitive oil and gas leases covering 78,000 acres within Fort Chaffee, Arkansas. Under procedures then in force, the Bureau of Land Management (BLM) referred petitioner's lease applications to the Area Geologist of the United States Geological Survey (USGS) in Tulsa, Oklahoma, for a determination as to whether any of the lands sought to be leased are located within a KGS.[3] The Area Geologist determined certain lands covered by petitioner's applications to be within KGS's, and other lands to be outside any KGS. Ultimately, 18 of petitioner's applications, covering 45,000 acres, were rejected for various reasons. The remaining 20 applications, covering approximately 33,000 acres, were accepted. Leases covering these lands, with an effective date of July 1, 1979, were issued to petitioner. Pet. App. Exh. 5, at 5-6.

In September 1979, respondent Arkla Exploration Company (Arkla) filed two separate lawsuits chal-

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[2] Such leasing requires the consent of the head of the executive department having jurisdiction over the lands for which the leases are to be issued. 30 U.S.C. 352.

[3] Both BLM and USGS are agencies within the Department of the Interior. By virtue of agency reorganizations that occurred after the referral in this case, KGS determinations are now performed by BLM.

lenging the issuance of petitioners' leases, one in the United States District Court for the Western District of Arkansas and one in the United States District Court for the District of Columbia. Upon Arkla's motion, the cases were later consolidated in the District of Columbia District Court. In addition, Arkla filed a protest with BLM concerning petitioners' leases. Pet. App. Exh. 4, at 7.

That same month, the Secretary directed the USGS to reevaluate its non-KGS classification of the Fort Chaffee lands. The subsequent report, known as the "Girard Report," concluded that "the Fort Chaffee negative KGS determination is correct in a legal sense." See Pet. App. Exh. 6, at 12.

3. On November 1, 1979, petitioner, apprehending that its leases were in danger, filed its own suit in the United States District Court for the District of Columbia seeking an order prohibiting the Secretary from cancelling the leases. Before any judicial order was issued, however, the Secretary issued a decision cancelling petitioner's leases. The reason given for the cancellation was that the applications had been filed prior to September 21, 1978, the effective date of new regulations intended to effectuate the 1975 statutory change which had removed the prohibition against mineral leasing on acquired military lands. Prior to September 21, 1978, Interior's regulations had tracked the former statutory scheme and had prohibited leasing of such lands.

Petitioner then amended its complaint to challenge the Secretary's cancellation of its leases. On September 25, 1980, however, the district court sustained the cancellation. *Texas Oil and Gas Corp.* v. *Andrus*, 498 F. Supp. 668 (Pet. App. Exh. 1). Petitioner appealed.

While petitioner's appeal was pending, the District of Columbia district court found Arkla's separate suit to be moot and dismissed it without prejudice (Pet. App. Exh. 3). No appeal was taken from this order. BLM also issued an order dismissing as moot Arkla's administrative protest of the leases to petitioner (Pet. App. Exh. 6, at 7-8).[4]

On June 11, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision in the case brought by petitioner, ruling that petitioner's leases were validly issued and must be reinstated. *Texas Oil and Gas Corp.* v. *Watt*, 683 F.2d 427 (*TXO*) (Pet. App. Exh. 2). The court reasoned that the 1976 statute permitting the Secretary to lease the Fort Chaffee lands had made the lands immediately subject to leasing without the necessity of any implementing regulation. The court accordingly held that the Secretary had acted in excess of his authority in cancelling petitioner's leases.

4. On August 4, 1982, before the Secretary had acted to reinstate petitioner's leases pursuant to the District of Columbia Circuit's decision in *TXO*, Arkla initiated the present action against the Secretary in the United States District Court for the Western District of Arkansas. Petitioner was later joined as a party defendant in the action. By its complaint, Arkla alleged, inter alia, that the Secretary had abused his discretion by determining that the lands leased to petitioner were not within a KGS and thus available for noncompetitive leasing under Section 17 of the MLA. Arkla sought an order barring the Secretary from reinstating the leases. The State of

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[4] BLM's order was issued on January 3, 1980, after the Secretary had cancelled the leases but before the district court had decided petitioner's suit.

Arkansas, which was subsequently given leave to intervene as a plaintiff, raised substantially the same issues and sought the same relief as Arkla.

The Secretary and petitioner moved to have this case transferred to the District of Columbia district court. Those motions were denied from the bench (Pet. App. Exh. 5, at 8). In addition, the Secretary and petitioner moved to dismiss on various grounds and to confine judicial review to the administrative record. These motions were likewise denied. The district court held that: (1) Arkla and the State had standing; (2) the MLA created a private right to maintain the action; (3) the suit was not barred by collateral estoppel; (4) the plaintiffs were not obliged to exhaust their administrative remedies; and (5) the action was not precluded by the statute of limitations (Pet. App. Exh. 4). In denying the motion to confine judicial review to the administrative record, the district court stated that it would not try the case de novo but that it would allow the introduction of "supplementary" materials and testimony (Pet. App. Exh. 4, at 28).

Following a trial, the district court entered a preliminary injunction barring the Secretary from reinstating petitioner's leases. Thereafter, the court entered findings of fact and conclusions of law holding, in substance, that the Secretary's non-KGS determinations were arbitrary and capricious (Pet. App. Exh. 4). The district court concluded, among other things, that the Secretary's non-KGS determinations were invalid because USGS had failed to base its determinations on all of the relevant facts. The court set out a partial list of geological and non-geological factors which it believed had to be considered (Pet. App. Exh. 4, at 29). The Arkansas District Court

entered a permanent injunction barring the Secretary from reinstating petitioner's leases or issuing any further leases in Fort Chaffee "until proper KGS determinations of these lands have been made * * *" (Pet. App. Exh. 6, at 29).

5. The Secretary and petitioner appealed, but the court of appeals affirmed (Pet. App. Exh. 6). Initially, the court of appeals rejected the appellants' argument that, in view of the District of Columbia Circuit's direction to the Secretary to reinstate petitioner's leases, the Arkansas district court abused its discretion by denying the transfer motions and, thus, subjecting the Secretary to the possibility of mutually inconsistent judicial orders. The Eighth Circuit observed that the District of Columbia Circuit's decision merely assumed that the non-KGS determinations were valid and accordingly did not preclude courts in other circuits from issuing orders and decisions regarding the Fort Chaffee leases on grounds not presented in the District of Columbia Circuit litigation:

> For our Court to require the Secretary to offer these lands for lease only after a lawful KGS determination does not conflict with the decision of the D.C. Circuit, to which this issue never has been presented. Because we hold these leases invalid notwithstanding the timeliness of TXO's application for them, our mandate necessarily supersedes that of the D.C. Circuit. The parties should not have any doubt that the instant decision now controls this matter.

Pet. App. Exh. 6, at 15.

The court then found that Arkla and the State of Arkansas each had standing to maintain the action; that the MLA created a private right of action for judicial review of the Secretary's decision to issue the

leases; and that, under the circumstances of this case, the plaintiffs were not required to exhaust their administrative remedies (Pet. App. Exh. 6, at 15-28). The court of appeals further ruled that the action was not barred by the statute of limitations or collateral estoppel (Pet. App. Exh. 6, at 20-22).

Turning to the scope of review on the KGS determination issue, the court stated that the Secretary's action could be set aside "if it is arbitrary, capricious, or contrary to law or the Secretary's regulations" (Pet. App. Exh. 6, at 22). The court of appeals acknowledged that the reviewing court "may not consider evidence outside the administrative record for the purpose of substituting its judgment for that of the agency." *Ibid.* But the court of appeals concluded that the district court had considered supplementary evidence of the procedures followed and facts considered by the Secretary. *Ibid.*

The court of appeals ultimately concluded that the non-KGS determinations at issue did not reflect adequate consideration of all relevant factors. In the instances pertinent here, the court found, the USGS geologist had typically made the KGS determinations by simply classifying sections immediately adjoining a section with a producing well—and only those sections—as part of a "known geological structure" (Pet. App. Exh. 5, at 11-12, 23-25). The court ruled that this approach was arbitrary because it failed to require consideration of geological information which might disclose that the KGS should be extended more than an additional section away from a producing section (Pet. App. Exh. 6, at 28-29). The court held, moreover, that the non-KGS determinations were defective because the existence of "competitive interest and risk of exploration were not considered * * *." *Id.* at 30.

Judge Gibson dissented. Judge Gibson stated that despite the district court's contrary protestations, the record disclosed that it had actually conducted a trial de novo and substituted its judgment for that of the Secretary. Judge Gibson concluded that the Secretary's non-KGS determinations had a rational basis in the record and should be upheld.

ARGUMENT

Although we regard the decision of the court of appeals as incorrect on the ultimate question whether the Secretary's KGS determinations should be set aside, this case does not present any issue that warrants review by this Court. The precedential impact of the court of appeals' decision is marginal because the Secretary is now making KGS determinations pursuant to standards and procedures which have been revised since the leases in question were issued. Moreover, while we believe that it would have been preferable to transfer the case to the District of Columbia district court so as to avoid the potential problem of facially conflicting mandates, we do not read the judgment of the court below as requiring the Secretary to take action that is foreclosed under a proper understanding of the D.C. Circuit's judgment. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioner correctly asserts (Pet. 10-13) that while the District of Columbia Circuit has directed the Secretary to reinstate its leases (see page 6, *supra*), the Eighth Circuit has now ordered him not to do so. It is our view that when one federal court has issued a directive to an executive branch officer to take action with regard to a particular party (here, to issue leases to petitioner), and the legality

of that agency's action is thereafter challenged by a third party in a different federal court, the better practice—assuming that there is no insurmountable procedural barrier—is generally for the second court to transfer the second case to the first court pursuant to 28 U.S.C. 1404. We believe that, in the circumstances of this case, the Arkansas district court should have transferred the present case to the District of Columbia district court, so as to have avoided the development of the *apparent* conflict noted by petitioner.

Nevertheless, the Eighth Circuit's decision in this case does not create any actual conflict that warrants further review. The validity of the Secretary's non-KGS determinations was not at issue in the District of Columbia proceeding, and Arkla and the State of Arkansas were not parties to that action.[5] It is reasonably apparent that the District of Columbia Circuit did not intend its judgment to preclude the Secretary from responding to successful third-party challenges to petitioner's leases on grounds distinct from those considered in the District of Columbia Circuit litigation. In the highly improbable event that the District of Columbia Circuit should subsequently determine that the Secretary must issue the leases to petitioner, notwithstanding third-party litigation, there will be time enough for this Court to review such an order. At present, however, the conflict between the two courts of appeals portrayed by petitioner is purely semantic.

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[5] Arkla filed a brief amicus curiae in the District of Columbia Circuit supporting the Secretary's cancellation of petitioners leases and participated in oral argument (Pet. App. Exh. 2, at 7 n.4). The State of Arkansas did not participate in any capacity.

2. As Judge Gibson concluded in his dissenting opinion (Pet. App. Exh. 6, at 32-35), the record discloses that, despite its statements to the contrary, the district court in fact conducted a de novo hearing and impermissibly substituted its judgment for that of the Secretary. The Secretary's non-KGS determinations had a rational basis and were correct as a legal matter. Indeed, because Congress specifically conferred upon the Secretary authority "to fix and determine the boundary of any structure, or oil or gas field, for the purposes of this chapter" (30 U.S.C. 189), the refusal of the courts below to accord substantial deference to the Secretary's non-KGS determinations was particularly inappropriate.

Nevertheless, the court of appeals' resolution of this issue does not merit further review. As the court of appeals observed (Pet. App. Exh. 6, at 31-32), following issuance of petitioner's leases, the Secretary has, of his own accord, initiated certain new procedures for making KGS determinations. The court of appeals seemingly indicated approval of these procedures. *Ibid.* In view of this apparent endorsement, it is unclear whether the court intended to impose any standards or requirements for making KGS determinations beyond those *currently* being employed by the Secretary. In any event, because a resolution of the KGS issue presented by the petition would necessitate a determination concerning the validity of KGS procedures which have since been superseded, a ruling on that issue here would have relatively little precedential value.[6] Should the court of appeals'

[6] Similarly, the court of appeals' disposition of the statute of limitations issue raised by petitioner (Pet. 20-21) turned exclusively upon the unique facts of this case (Pet. App. Exh. 6, at 20-21). Absent such unusual facts, the 90-day statute

reasoning prove in the future to create a substantial impediment to the operation of the federal onshore oil and gas leasing program, this Court can address the matter in a subsequent case when the nature of any administrative difficulties stemming from the present opinion has become clear.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of limitations of Section 42 of the MLA, 30 U.S.C. 226-2, will shield leases previously issued under the Secretary's former procedures from third-party attack.

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